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Responsibility of international organizations

Comments and observations received from Governments and international organizations

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I. Introduction

1. On 9 December 2003, the General Assembly adopted resolution 58/77, entitled "Report of the International Law Commission on the work of its fifty-fifth session". In paragraph 5 of that resolution, the Assembly invited States and international organizations to submit information concerning their practice relevant to the topic "Responsibility of international organizations", including cases in which States members of an international organization may be regarded as responsible for acts of the organization.[1] In addition, the Commission sought comments on specific issues of particular interest to it in paragraph 27 of its 2003 report[2] and paragraph 25 of its 2004 report.[3]

2. Moreover, at its fifty-fifth session, the Commission requested that the Secretariat of the United Nations circulate, on an annual basis, the portions of its report relevant to this topic to international organizations for their comments. Pursuant to this request, selected international organizations were invited to submit their comments on the relevant portions of the Commission's 2003 and 2004 reports.[4]

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[1] The replies received prior to 1 May 2004 were reproduced in A/CN.4/547.

[2] *Official Records of the General Assembly, Fifty-eighth Session, Supplement No. 10* (A/58/10). In 2003, the Commission invited comments on the following issues:

(a) Whether a general rule on attribution of conduct to international organizations should contain a reference to the "rules of the organization";

(b) If the answer to (a) is in the affirmative, whether the definition of "rules of the organization", as it appears in article 2, paragraph 1 (j), of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, is adequate;

(c) The extent to which the conduct of peacekeeping forces is attributable to the contributing State and the extent to which it is attributable to the United Nations.

[3] *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 10* (A/59/10). In 2004, the Commission invited comments on the following issues:

(a) Relations between an international organization and its member States and between an international organization and its agents are mostly governed by the rules of the organization, which are defined in draft article 4, paragraph 4, as comprising "in particular: the constituent instruments, decisions, resolutions and other acts taken by the organization in accordance with those instruments; and established practice of the organization". The legal nature of the rules of the organization in relation to international law is controversial. It is at any event debatable to what extent the Commission should, in its study of responsibility of international organizations under international law, consider breaches of obligations that an international organization may have towards its member States or its agents. What scope should the Commission give to its study in this regard?

(b) Among the circumstances precluding wrongfulness, article 25 on responsibility of States for internationally wrongful acts refers to "necessity", which may be invoked by a State under certain conditions: first of all, that the "act not in conformity with an international obligation of that State [...] is the only way for the State to safeguard an essential interest against a grave and imminent peril". Could necessity be invoked by an international organization under a similar set of circumstances?

(c) In the event that a certain conduct, which a member State takes in compliance with a request on the part of an international organization, appears to be in breach of an international obligation both of that State and of that organization, would the organization also be regarded as responsible under international law? Would the answer be the same if the State's wrongful conduct was not requested, but only authorized, by the organization?

[4] The replies received prior to 20 April 2004 are contained in A/CN.4/545.

3. As at 9 May 2005, written comments had been received from the following two States (dates of submission in parentheses): Democratic Republic of the Congo (17 May 2004) and Germany (4 April 2005). Written comments have also been received from the following eight international organizations (dates of submission in parentheses): European Commission (18 March 2005), International Criminal Police Organization (9 February 2005), International Monetary Fund (1 April 2005), International Seabed Authority (7 February 2005), Organization for the Prohibition of Chemical Weapons (1 February 2005), United Nations Secretariat (9 March 2005), World Intellectual Property Organization (19 January 2005) and World Trade Organization (1 February 2005). These comments are reproduced in section II below, in a topic-by-topic manner. Additional submissions received will be reproduced as addenda to the present report.

II. Comments and observations received from Governments and international organizations

A. General remarks

European Commission

Our general view on the work of the International Law Commission in 2004 was expressed in the European Union statement to the Sixth Committee of the General Assembly on 5 November 2004.

We believe that the International Law Commission should carefully consider the large diversity among international organizations when adapting the articles on State responsibility to the topic of responsibility of international organizations. The European Union and the European Community are themselves testimony to this diversity. In particular, the European Community is an international organization with special features as envisaged in the founding treaties. According to those treaties, member States have transferred some of their competencies to the organization. However, the European Community cannot be assimilated to a State, even if its institutions can enforce regulations or other European Community acts that are directly applicable in member States' legal orders. For the application of those acts the European Community relies on its member States and their authorities.

According to article 3 (2) of the draft articles, there is an international wrongful act of an international organization when conduct consisting of an action or omission:

(a) Is attributable to the international organization under international law; and

(b) Constitutes a breach of an international obligation of that international organization.

Therefore, the normal situation described in draft article 3 (2) is that conduct is attributed to the organization that is the bearer of the obligation. However, there could be cases in which the European Community could be considered responsible for the infringement of international obligations because of the conduct of the organs of member States.

The European Community is the bearer of many international obligations (especially because it has concluded many treaties). However, sometimes not only the behaviour of its own organs, but also organs of its member States, may breach such obligations. Such behaviour would therefore be prima facie attributable to those member States.

I will give an example of this situation: the European Community has contracted a certain tariff treatment with third States through an agreement or within the framework of the World Trade Organization. The third States concerned find that this agreement is being breached, but by whom? Not by the European Community's organs, but by the member States' customs authorities that are charged with implementing Community law. Hence their natural reaction is to blame the member States concerned. In short, there is separation between responsibility and attribution: the responsibility trail leads to the European Community, but the attribution trail leads to one or more member States.

This example illustrates why we feel that there is a need to address the special situation of the Community within the framework of the draft articles. One could think of the following ways to accommodate the special situation of the European Community and other potentially similar organizations:

(1) Special rules of attribution, so that actions of member States' organs can be attributed to the organization;

(2) Special rules for responsibility, so that responsibility can be charged to the organization, even if member States' organs were the prime actors of a breach of an obligation borne by the organization;

(3) Consideration of the possibility that the European Community and organizations like it should benefit from a special exception or of a kind of special savings clause for such an organization.

We would rather not contemplate the last possibility at this early stage. We favour to continue work for one of the two other solutions.

International Criminal Police Organization

Created in 1923, Interpol is an international police organization in which 182 countries are represented. It facilitates international police cooperation, and supports and assists all organizations, authorities and services whose mission is to prevent or combat crime. Its headquarters is in Lyon, France. Interpol also has five regional bureaux, in Harare, Abidjan, Nairobi, Buenos Aires and San Salvador, a liaison office in Bangkok and a Special Representative accredited to the United Nations. Each Interpol country provides a National Central Bureau (NCB) staffed by national law enforcement officers. NCB is the designated contact point for the General Secretariat, regional bureaux and other Interpol countries requiring assistance with transborder investigations and the location and apprehension of fugitives.

The intention is to facilitate international police cooperation even where diplomatic relations do not exist between particular countries.

Interpol focuses on three areas, referred to as its core functions:

Secure global police communications services. The fundamental condition for international police cooperation is for police forces to be able to communicate with

each other securely throughout the world. In response, Interpol has developed a global police communications system known as I-24/7 (Interpol, 24 hours a day, 7 days a week).

Operational data services and databases for police. Once police can communicate internationally, they need access to information to assist in their investigations or allow them to prevent crime. Interpol has therefore developed and maintains a range of global databases, covering key data such as names of individuals, fingerprints, photographs, DNA, identification and travel documents and Interpol notices.

Operational police support services. Interpol currently prioritizes crime-fighting programmes on fugitives, terrorism, drugs and organized crime, trafficking in human beings and financial and high-tech crime. Other projects deal with child pornography on the Internet, stolen vehicles, stolen works of art, bioterrorism, police training and cooperation with other international organizations. A further function is to alert police in Interpol countries to wanted persons, missing persons, criminal modus operandi etc. via Interpol notices. The most widely known of these is the Red Notice, which is an international request for the provisional arrest of an individual, pending extradition. It is based on a valid arrest warrant in the requesting member. It is not an international arrest warrant. Interpol has also created a number of working groups which bring together experts from around the world who specialize in a variety of fields to develop and promote best practice and training in crime investigation and analysis.

Interpol is primarily financed by the affiliated countries whose Governments pay annual contributions. The General Assembly is Interpol's supreme governing body. It meets once a year to take all major decisions affecting general policy. It is composed of delegates appointed by the Governments of the affiliated countries. Each country represented has one vote, and all votes have equal standing. The Executive Committee verifies the execution of the decisions of the General Assembly and the work of the Secretary-General. It has 13 members: the President (who chairs the Committee), three Vice-Presidents and nine delegates. Members are elected by the General Assembly, should come from different countries and represent their regions. The President and three Vice-Presidents should each belong to a different region. The President is elected for four years and the Vice-Presidents for three. The Secretary-General is the organization's chief administrative officer and senior full-time official. The Executive Committee nominates a candidate to serve a five-year term of office who is confirmed by a two-thirds majority of the General Assembly. The Secretary-General is responsible for overseeing the day-to-day work of international police cooperation at the General Secretariat, and the implementation of the decisions of the General Assembly and Executive Committee.

International Monetary Fund

We appreciate being invited to comment on the draft articles and assure you of the continued interest of the International Monetary Fund in this important project.

[...]

[W]e hope that our general observations, the responses to the questions posed and our comments on the specific draft articles will be helpful to the Commission in

its important endeavour and that the Commission will give serious consideration to our concerns in its work.

Furthermore, given the fundamental nature of the issues identified in our general comments, we believe it would be apposite if the Commission were to explain its reasons for continuing to rely extensively on the draft articles on State responsibility, given the basic differences between States and international organizations and between international organizations inter se. As the work of the Commission develops, we may feel the need to return to the earlier draft articles and hope that the Commission would be amenable to receiving additional comments on these provisions. We look forward to our continuing involvement in this project.

International Seabed Authority

Having gone through chapter III (B) and chapter V of the International Law Commission report, we find the issue of responsibility of international organizations currently tackled by the Commission not only important but complicated as well. While we are willing to contribute to the work of the Commission as much as we possibly can in the future, we would like to reproduce, for the information of the Commission in respect to the scope of its study on the issue, the following relevant provisions under the Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area adopted by the Assembly of the International Seabed Authority in 2000 (ISBA/6/A/18):

"*Regulation 35*

"*Proprietary data and information and confidentiality*

"1. Data and information submitted or transferred to the Authority or to any person participating in any activity or programme of the Authority pursuant to these Regulations or a contract issued under these Regulations, and designated by the contractor, in consultation with the Secretary-General, as being of a confidential nature, shall be considered confidential unless it is data and information which:

"(a) Is generally known or publicly available from other sources;

"(b) Has been previously made available by the owner to others without an obligation concerning its confidentiality; or

"(c) Is already in the possession of the Authority with no obligation concerning its confidentiality.

"2. Confidential data and information may only be used by the Secretary-General and staff of the Secretariat, as authorized by the Secretary-General, and by the members of the Legal and Technical Commission as necessary for and relevant to the effective exercise of their powers and functions. The Secretary-General shall authorize access to such data and information only for limited use in connection with the functions and duties of the staff of the Secretariat and the functions and duties of the Legal and Technical Commission.

"3. Ten years after the date of submission of confidential data and information to the Authority or the expiration of the contract for exploration, whichever is the later, and every five years thereafter, the Secretary-General

and the contractor shall review such data and information to determine whether they should remain confidential. Such data and information shall remain confidential if the contractor establishes that there would be a substantial risk of serious and unfair economic prejudice if the data and information were to be released. No such data and information shall be released until the contractor has been accorded a reasonable opportunity to exhaust the judicial remedies available to it pursuant to Part XI, section 5, of the Convention.

"4. If, at any time following the expiration of the contract for exploration, the contractor enters into a contract for exploitation in respect of any part of the exploration area, confidential data and information relating to that part of the area shall remain confidential in accordance with the contract for exploitation.

"5. The contractor may at any time waive confidentiality of data and information.

"*Regulation 36*

"*Procedures to ensure confidentiality*

"1. The Secretary-General shall be responsible for maintaining the confidentiality of all confidential data and information and shall not, except with the prior written consent of the contractor, release such data and information to any person external to the Authority. To ensure the confidentiality of such data and information, the Secretary-General shall establish procedures, consistent with the provisions of the Convention, governing the handling of confidential information by members of the Secretariat, members of the Legal and Technical Commission and any other person participating in any activity or programme of the Authority. Such procedures shall include:

"(a) Maintenance of confidential data and information in secure facilities and development of security procedures to prevent unauthorized access to or removal of such data and information;

"(b) Development and maintenance of a classification, log and inventory system of all written data and information received, including its type and source and routing from the time of receipt until final disposition.

"2. A person who is authorized pursuant to these Regulations to have access to confidential data and information shall not disclose such data and information except as permitted under the Convention and these Regulations. The Secretary-General shall require any person who is authorized to have access to confidential data and information to make a written declaration witnessed by the Secretary-General or his or her authorized representative to the effect that the person so authorized:

"(a) Acknowledges his or her legal obligation under the Convention and these Regulations with respect to the non-disclosure of confidential data and information;

"(b) Agrees to comply with the applicable regulations and procedures established to ensure the confidentiality of such data and information.

"3. The Legal and Technical Commission shall protect the confidentiality of confidential data and information submitted to it pursuant to these Regulations or a contract issued under these Regulations. In accordance with the provisions of article 163, paragraph 8, of the Convention, members of the Commission shall not disclose, even after the termination of their functions, any industrial secret, proprietary data which are transferred to the Authority in accordance with annex III, article 14, of the Convention, or any other confidential information coming to their knowledge by reason of their duties for the Authority.

"4. The Secretary-General and staff of the Authority shall not disclose, even after the termination of their functions with the Authority, any industrial secret, proprietary data which are transferred to the Authority in accordance with annex III, article 14, of the Convention, or any other confidential information coming to their knowledge by reason of their employment with the Authority.

"5. Taking into account the responsibility and liability of the Authority pursuant to annex III, article 22, of the Convention, the Authority may take such action as may be appropriate against any person who, by reason of his or her duties for the Authority, has access to any confidential data and information and who is in breach of the obligations relating to confidentiality contained in the Convention and these Regulations."

In the draft regulations on prospecting and exploration for polymetallic sulphides and cobalt-rich ferromanganese crusts in the area which was submitted by the Legal and Technical Commission of the Authority in 2004 to the Council for its consideration in 2005, similar provisions on confidential data and the obligation of the Authority to protect them are incorporated as well (ISBA/10/C/WP.1, regulations 38 and 39).

World Trade Organization

To the best of our knowledge, the World Trade Organization (WTO) Legal Service has, until now, never been confronted with any formal claim of violation of international law by WTO. As a result, we do not feel that we have the experience necessary to make any meaningful comments on the International Law Commission work at this stage. However, we would be grateful if we could continue to be associated with your consultation process in the future.

B. Draft article 1 — Scope of the draft articles

4. Draft article 1, as provisionally adopted by the Commission at its fifty-fifth session, reads as follows:

"Article 1

"Scope of the present draft articles

"1. The present draft articles apply to the international responsibility of an international organization for an act that is wrongful under international law.

"2. The present draft articles also apply to the international responsibility of a State for the internationally wrongful act of an international organization."[5]

International Criminal Police Organization

Paragraph 2

Given the proposed definition of the term "international organization", it needs to be determined whether it is appropriate for paragraph 2 to only speak of the international responsibility of a State for the international wrongful act of an international organization. Should draft article 1, paragraph 2, not also cover the responsibility of non-State members for the international wrongful act of an international organization?

As made clear by the second sentence of draft article 2 ("use of terms"), international organizations may include as members, in addition to States, other entities. Indeed, international practice confirms that not only States are members of international organizations and, as noted by Professor Brownlie, while "organizations are normally composed of States, a number of organizations have operated in effect a functional concept of membership compatible with their special purposes".[6]

ICPO-Interpol is a case in point. Currently, sovereign States as well as non-independent countries, which are self-governing in police matters, are represented in ICPO-Interpol through their police bodies. The situation in ICPO-Interpol conforms to the general view in doctrinal writings that there exists no general rule of international law that bars disaggregated national institutions, non-independent territories,[7] associated States,[8] or other entities from membership in international organizations. Whether they are allowed or not must be determined primarily by the relevant rules of the organization. There are international organizations which expressly allow non-sovereign countries to participate as full members. That is for instance the case in some equally functional organizations, such as the Universal Postal Union (UPU) and the World Meteorological Organization (WMO). Some trade-related international organizations also allow the membership of non-independent territories. This is true for the World Trade Organization (WTO), for the Agency for International Trade Information and Cooperation (AITIC) the Advisory Centre on WTO Law, and the World Customs Organization (WCO). Other functional international organizations also allow participation of non-independent territories. In addition, there are several regional organizations, which also allow non-sovereign countries to become full members. Recently it was confirmed in the BIS repurchase of private shares award,[9] that the Bank for International Settlements

[5] *Official Records of the General Assembly, Fifty-eighth Session, Supplement No. 10* (A/58/10), para. 53.

[6] I. Brownlie, *Principles of Public International Law*, 6th ed. (Oxford, 2003), p. 660, and J. E. S. Fawcett, *The Place of Law in an International Organization*, 36 *British Yearbook of International Law*, 1960, p. 341.

[7] R. Covar, *La participation des territoires non autonomes aux organisations internationales*, 15 Ann. Dr-Int., 1969, pp. 522-549.

[8] See M. Igarashi, *Associated Statehood in International Law* (The Hague/London/New York, Kluwer Law International, 2002), pp. 283-294.

[9] Permanent Court of Arbitration, partial award of 22 November 2002, http://www.pca-cpa.org/ENGLISH/RPC/BIS/EPA.pdf.

is one example where countries came together and created an international organization, but in which the central banks of the contracting countries, rather than the countries themselves, are members.[10] Similarly, article IV-A of the agreement establishing the Joint Vienna Institute also makes a distinction between the parties to the agreement and the members.[11] The Inter-Parliamentary Union (IPU) is the international organization of the Parliaments of sovereign States. IPU has transformed itself from an association of individual parliamentarians into the international organization of the Parliaments of sovereign States. Its members are not the States, but the Parliaments of the States.

C. Draft article 2 — Use of terms

5. Draft article 2, as provisionally adopted by the Commission at its fifty-fifth session, reads as follows:

> "Article 2
>
> "Use of terms
>
> For the purposes of the present draft articles, the term 'international organization' refers to an organization established by a treaty or other instrument governed by international law and possessing its own international legal personality. International organizations may include as members, in addition to States, other entities.[12]

International Criminal Police Organization

According to the first sentence of draft article 2, an international organization is nothing else but a juristic person, which derives its autonomous legal personality not from any national law, but from international public law. That seems to cover the concept of international organization entirely. One wonders whether the second sentence is indeed necessary. Theoretically an international organization as defined by the first sentence could exist that does not have members at all. Is it the intention to exclude organizations which do not have members at all from the application of the rules of responsibility?

International Monetary Fund

Although we had previously commented on draft article 2, we wish to highlight a factual error in the earlier commentaries to this draft article and seek clarifications with regard to a related proposition.

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[10] See also R. Bermejo, "La banque des règlements internationaux: approche juridique", *Hague Yearbook of International Law* (1989), pp. 100-101.

[11] The Joint Vienna Institute is a cooperative venture of six international organizations — Bank of International Settlements, European Bank for Reconstruction and Development, International Bank for Reconstruction and Development, the International Monetary Fund, the Organization for Economic Cooperation and Development, and the World Trade Organization — and the Government of Austria. It provides training for officials of Central and Eastern European countries, the former Soviet Union and former centrally planned economies in Asia.

[12] *Official Records of the General Assembly, Fifty-eighth Session, Supplement No. 10* (A/58/10), para. 53.

Footnote 51 of the earlier report, dealing with the definition of international organizations, stated that only international organizations are members of the Joint Vienna Institute (JVI), when in fact Austria is now also a member of JVI.

The same footnote states that JVI would not be covered by the draft articles because its membership only comprises international organizations. The reason for this assertion is unclear to us. We would be grateful if the Commission or the Special Rapporteur could please clarify why membership by only international organizations, in another international organization, would exclude this other organization from being covered by the present draft articles. Further, with regard to JVI, does membership by one State subject it to being covered by the draft articles or is membership by more than one State required (since the plural word "States" is used in the last sentence of draft article 2)?

In this connection, we would also appreciate some clarification concerning the meaning assigned to the term "State" in these draft articles. The commentary to draft article 2 explained that a State could be understood to include State organs or agencies. Would this reference include agencies that are separate legal entities? For instance, is a State-owned central bank deemed to be a State for the purposes of these draft articles? Would an organization owned by central banks be subject to these draft articles?

D. Draft article 3 — General principles

6. Draft article 3, as provisionally adopted by the Commission at its fifty-fifth session, reads as follows:

"Article 3

"General principles

"1. Every internationally wrongful act of an international organization entails the international responsibility of the international organization.

"2. There is an internationally wrongful act of an international organization when conduct consisting of an action or omission:

"(a) Is attributable to the international organization under international law; and

"(b) Constitutes a breach of an international obligation of that international organization."[13]

International Criminal Police Organization

Please refer to comments contained in section II, part L, infra.

International Monetary Fund

We also wish to highlight that certain statements made in paragraph 72 (2) of this draft report and in paragraph (1) of the commentary to draft article 3 contain an unsubstantiated and unexplained characterization of fundamental issues, in

[13] *Official Records of the General Assembly, Fifty-eighth Session, Supplement No. 10* (A/58/10), para. 53.

suggesting that attribution of conduct is not an essential requirement for international responsibility of international organizations.

The commentary to draft article 1 explicitly stated, in paragraph (5), that "international responsibility is linked with a breach of an obligation under international law". It also recognized that international responsibility may arise from an activity that is not prohibited by international law "only when a breach of an obligation under international law occurs in relation to that activity". If international responsibility necessarily requires the breach of an obligation, then international responsibility for that breach cannot be imputed to a subject of international law, unless the conduct giving rise to the breach is attributable to that subject of international law. We know of no support for the proposition that attribution is not required for the application of international responsibility in such cases.

In the draft articles on State responsibility the term "international responsibility" was used to cover "relations which arise under international law from the internationally wrongful act of a State".[14] Admittedly, this statement could be read to mean that the term "international responsibility" might also cover international legal relations which arise from other acts of a State as well (i.e., acts that are not wrongful). However, the draft articles on State responsibility categorically stated that they were not dealing with such primary obligations. On the contrary, "for the purposes of these articles [i.e., on State responsibility], international responsibility results *exclusively* from a wrongful act contrary to international law". (Emphasis added.) Further, the draft articles on State responsibility were also explicit in stating that for an internationally wrongful act to occur the conduct in question "must be attributable to the State under international law".

Therefore, even under the present draft articles, the conduct of a State or other organization could only give rise to the responsibility of an international organization if that conduct is attributable to the international organization being held responsible. Even conduct, otherwise not attributable, but acknowledged and adopted by the international organization as its own, becomes attributable to the organization by virtue of such acknowledgement and adoption.[15]

It is therefore surprising that the commentary should now assert that "responsibility of an international organization may in certain cases also arise when conduct is not attributable to that international organization". We do not recognize the validity of such a proposition and see no legal basis on which to accept this statement as codifying either a general principle of international law or as representing a proposal for its progressive development.

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[14] *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10), p. 67.

[15] This is similar to draft article 11 of the articles on State responsibility noted by the General Assembly. See "Responsibility of States for internationally wrongful acts", annex to General Assembly resolution 56/83 of 12 December 2001.

E. Draft article 4 — General rule on attribution of conduct to an international organization

7. Draft article 4, as provisionally adopted by the Commission at its fifty-sixth session, reads as follows:

"Article 4

"General rule on attribution of conduct to an international organization

"1. The conduct of an organ or agent of an international organization in the performance of functions of that organ or agent shall be considered as an act of that organization under international law whatever position the organ or agent holds in respect of the organization.

"2. For the purposes of paragraph 1, the term 'agent'" includes officials and other persons or entities through whom the organization acts.

"3. Rules of the organization shall apply to the determination of the functions of its organs and agents.

"4. For the purpose of the present draft article, 'rules of the organization' means, in particular: the constituent instruments; decisions, resolutions and other acts taken by the organization in accordance with those instruments; and established practice of the organization."[16]

International Criminal Police Organization

Paragraph 2

The ICPO-Interpol reality reveals that an entity can be an organ or agent of both a country and an international organization at the same time. In such case, even if one of its organs or agents is involved in a conduct, that conduct is not always by definition attributable to ICPO-Interpol. That would certainly not be the case if the action concerned is performed in the capacity of local law enforcement authorities. Hence, the rule proposed by the Commission must be qualified in order to express this nuance.

In the case of ICPO-Interpol, any discussion with regard to the attribution of conduct to the organization must take into account article 5 of the Constitution.[17] According to article 5, ICPO-Interpol shall comprise:

- The General Assembly
- The Executive Committee
- The General Secretariat
- The National Central Bureaus
- The Advisers.

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[16] *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 10* (A/59/10), para. 71.

[17] This provision has the same function as similar provisions in the constitutions of other international organizations, such as, inter alia, article XII, section 1, IMF Articles of Agreement; article III, Constitution of the United Nations Educational, Scientific and Cultural Organization; article 13, Constitution of the Universal Postal Union.

The Constitution further stipulates that, in the exercise of their duties, all members of the Executive Committee shall conduct themselves as representatives of ICPO-Interpol and not as representatives of their respective countries (article 21). Similarly, the Secretary-General and the staff members are declared international officials, who cannot represent nor be given instructions by countries with regard to the exercise of their duties (articles 29 and 30).

Conduct of the National Central Bureaus

A controversy exists with regard to the question whether the National Central Bureaus (NCBs) mentioned in article 5 are organs of ICPO. In an opinion issued in 1980 at the request of the Secretary-General of ICPO-Interpol, Professor Reuter assumed the following position, which does not distinguish between attribution of conduct and responsibility:

> "The National Central Bureaus are not organs of the organization; their functions are not subject to the provisions of the Constitution; they are not under the authority of the Secretary-General. If a wrongful act, whether national or international, is committed by a National Bureau, it is not ICPO that is responsible but the State where that Bureau is located."[18]

Reuter's description in the first sentence of the above quote is not accurate. The Constitution and practice of the organization contain enough indicators which support the view that the NCBs are either organs or agents of ICPO-Interpol.[19] It appears from report No. 5 of the Secretary-General to the 34th session of the General Assembly (Rio de Janeiro, 1965) that from 1925 through 1927, the notion of NCB referred to national organs responsible for the centralization of documentation and correspondence with foreign entities on police matters. The first NCBs were created between 1927 and 1938. Between 1946 and 1954, the NCBs consolidated their pivotal role in the system for international police cooperation and in 1956 the concept of the NCB was deemed sufficiently solid and clear to be listed in article 5 of the Constitution as part of the structure of the organization. The Secretary-General described the NCB as follows:

> An Interpol National Central Bureau is at the national level the correspondent, the representative, the competent responsible authority of the organization; consequently, it is the national centre for matters of police cooperation.[20]

In addition to the listing in article 5, article 26 (e), of the Constitution stipulates that the General Secretariat must deal exclusively with the NCBs as far as concerns questions relative to the search for criminals. More importantly, article 32 requires each Interpol country to appoint a body which will serve as the NCB. The NCB shall ensure liaison with:

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[18] "Problèmes juridiques relatifs au statut de l'OIPC-Interpol, Consultation du Professeur Reuter", published in *Interpol — Les textes fondamentaux de l'Organisation Internationale de Police Criminelle* (PUF, 2001), pp. 60-61.

[19] It should be noted that the English version of the ICPO-Interpol Constitution does not employ the term "organs", but "body" (e.g. articles 6, 26, 29). The French version uses "organes", "organismes" and "institutions". The Spanish version employs "órganos" and "organismos".

[20] "An Interpol NCB (or NCB) is, at the national level, the correspondent, representative and body responsible for the Organization; it is therefore the national centre for police cooperation issues." AGN/34/RAP/5, p. 6.

(a) The various departments in the country;

(b) Those bodies in other countries serving as NCBs;

(c) The organization's General Secretariat.

The NCBs play a pivotal role in the system for international police cooperation set up by ICPO-Interpol. This was made clear during the 34th session of the General Assembly (Rio de Janeiro, 1965),[21] when a report titled "Doctrine des Bureaux centraux nationaux"[22] was appended to the General Regulations. In 1994, at the 63rd session of the General Assembly in Rome, 17 service standards for NCBs (attached at appendix II) were adopted as an appendix to the General Regulations.[23] These service standards set out good practice for NCB operations and provided a framework for measuring NCB performance against such good practice. Implementation of these standards is designed to improve mutual assistance and services between NCBs and support for the NCBs from the General Secretariat. This supports the view that the NCBs are "organs" or "agents" of ICPO-Interpol.

Thus the ICPO-Interpol Constitution goes beyond that by listing the NCBs as components of the structure of the organization. Moreover, it defines their function in relation to the General Secretariat (not in relation to the organization), in relation to the other departments within the countries and in relation to other NCBs. Accordingly, inasmuch that the General Assembly derives its authority to regulate certain aspects of the other components of the structure of the organization, it is also legally authorized by article 44 of the Constitution to adopt rules with regard to the NCBs.

Given the case law of the International Court of Justice involving the concept "agent" of an organization discussed in the commentary on draft article 4, it must be conceded that NCBs must be deemed to be either organs or agents of ICPO as far as concerns the special liaison function conferred on them by the Constitution. However, as mentioned before, that function is subject to the condition of respect for the limits of the laws existing in the different countries (article 2, paragraph 1) and the compatibility of the actions of members with the legislations of their countries (article 31). As a result, ICPO-Interpol never exercises effective control over any NCB. Moreover, the act of actual apprehension of a wanted person or the use of evidence obtained through ICPO-Interpol sources (including criminal analysis produced by the General Secretariat) in national criminal procedures, are actions only national law enforcement authorities can perform, which cannot be said to be based on the rules of ICPO-Interpol. Thus, even if the NCBs were to be considered to be either organs or agents of ICPO-Interpol, given the terms of article 32 of the Constitution, in combination with articles 2, paragraph 1, and 31, the conduct of NCBs will normally not be attributed to ICPO-Interpol. The judgment in Founding Church of Scientology v. The Secretary of the Treasury (D. T. Regan) contains the following description of the position of the NCBs, which partly reflects the foregoing:

> "Interpol has established a worldwide communications network, but all actual investigative and enforcement functions are performed by domestic police authorities of participating Governments. Each member country designates a

[21] AGN/34/RES/5.

[22] The official English title is: "The National Central Bureaus of ICPO-Interpol: Policy".

[23] ANG/63/14.

> national law enforcement agency — the United States has appointed USNCB — referred to as its "national central bureau", to serve as a message and information exchange between that country and Interpol. Official inquiries emanating from law enforcement entities within a member country are channelled through its national central bureau to Interpol, and the route is reversed for responses. The national central bureaus thus serve as transmitters between domestic law enforcers and Interpol, which, in turn, is the conduit of communication among the national central bureaus of different nations."[24]

Obviously, this description incorrectly assimilates the ICPO-General Secretariat with the organization as a whole. Nevertheless, it explains correctly that national law enforcement entities remain responsible for the law enforcement actions in their territories.

The ruling in that case also sheds light on the question of how the position of the NCB in relation to the organization should be approached for the purposes of attribution of conduct. This was a ruling on appeal taken from orders of the United States District Court for the District of Columbia, requiring USNCB to disclose documentary materials previously received from foreign police agencies through the ICPO-Interpol General Secretariat concerning the Church of Scientology, under the United States Freedom of Information Act, and to retrieve and index similar documents from the ICPO-Interpol files in France. The United States Court of Appeals held that the Freedom of Information Act (FOIA) empowers United States federal courts to compel disclosure of agency records improperly withheld, but does not confer authority upon the courts to command agencies to take possession or control of records they do not already have.

The key question was therefore whether USNCB and ICPO-Interpol can be assimilated. The District Court took the position that USNCB was required to retrieve the sought-after documents from Interpol under the FOIA section providing for search and collection of the requested records from field facilities and other establishments that are separate from the office processing the request. The United States Court of Appeals held differently. It did not agree with that rationale of the District Court. It held that, although USNCB is an affiliate of ICPO-Interpol, it serves only as the United States liaison with the organization; it is neither a branch nor an agent of Interpol. It based this characterization on Sami v. United States, where it was held that "USNCB act(s) exclusively as an agent of the national Government which created, staffed, financed and equipped it,"[25] and that therefore the presence of USNCB in the District of Columbia was not enough to establish a predicate for personal jurisdiction of the District Court over ICPO-Interpol. According to the United States Court of Appeals, the same reasoning fully applied in the instant case. If USNCB is not sufficiently related to ICPO-Interpol to subject the latter to the jurisdiction of the District Court, surely Interpol is a third party from which the NCB cannot be ordered to retrieve documents. Consequently, it overruled the District Court's order requiring USNBC to retrieve and index the documents already forwarded to ICPO-Interpol.

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[24] United States Court of Appeals, District of Columbia, 31 December 1981 (http://www.xenu.net/archive/CourtFiles/occf177.html).

[25] 617 F.2d 755, 758-60 (D.C. Cir. 1979).

The above assertion that the conduct of NCB will normally not be attributed to ICPO-Interpol — even if the NCBs were to be considered as either organs or agents of ICPO-Interpol — is confirmed by the way in which the European Court of Human Rights, the Inter-American Court of Human Rights, the United Nations Human Rights Commission, as well as the International Court of Justice (in the Yerodia case), handled complaints involving behaviour of NCBs alleged to be in violation of the fundamental rights of persons sought or apprehended through the ICPO-Interpol system. In all those instances, the actions of NCBs were attributed to their country.

Admittedly, when NCBs populate or use any database of ICPO-Interpol's General Secretariat, this constitutes a typical liaison function contemplated by article 32 (c) of the ICPO-Interpol Constitution. However, in addition to the conditions of respect for the limits of the laws existing in the different countries (article 2, paragraph 1) and the compatibility of the actions of members with the legislations of their countries (article 31), other important stipulations ensure that such acts cannot be attributed to ICPO-Interpol. Article 5 of the ICPO-Interpol Rules on the Processing of Information for the Purposes of International Police Cooperation, clearly states that:

- The NCBs (and other authorized entities) remain responsible for the information they communicate through the police information system and which may be recorded in the organization's files;
- They must take steps to ensure that the information still fulfils the conditions for being processed by the organization;
- They must take any appropriate steps to ensure the accuracy and relevance of the information and inform the General Secretariat of any change or deletion that needs to be carried out;
- Prior to the use of any information obtained through the ICPO-Interpol information system, the NCBs (and other authorized entities) must check with the General Secretariat and the source of the information to ensure that the information is still accurate and relevant.[26]

The conclusion to be drawn is that, even though NCBs should be classified as organs or at least agents of ICPO-Interpol, whenever they act in their capacity as local law enforcement authorities their conduct cannot normally be attributed to ICPO-Interpol. Hence, the rule proposed by the Commission must be qualified in order to express this nuance.

Conduct of the General Secretariat: functions conferred by the rules of the organization

The recommendations mentioned in the annual reports of the Commission for the control of the ICPO-Interpol files, made following an investigation pursuant to individual complaints, confirm that the actions of the General Secretariat with regard to the processing of information are actions of the organization which are deemed to engage the responsibility of the organization.

[26] Article 10 of the Rules on the Processing of Information for the Purposes of International Police Cooperation, contains the corresponding obligations of the General Secretariat.

The authorization of access to the ICPO-Interpol files to third parties by the General Secretariat is also a conduct that is attributable to ICPO-Interpol.

Conscious of the risks involved, articles 2 and 3 of the ICPO-Interpol Rules on the Processing of Information for the Purposes of International Police Cooperation, restricts the purposes for which information can be processed by ICPO-Interpol or through its channels to two:

(a) Processing for international police purposes;

(b) Processing for purposes related to the effective administration of the organization.

Particularly, the processing of nominal data for any other purpose would be ultra vires. To ensure that the ICPO-Interpol files remain within the limits of articles 2 and 3 of its Constitution, article 10 of the ICPO-Interpol Rules on the Processing of Information for the Purposes of International Police Cooperation sets out the general conditions for the processing of information by the General Secretariat. It mirrors the obligations resting on the NCBs contained in article 5. Its provisions impose the obligation on the General Secretariat to verify whether the information that is processed is intra vires and otherwise consistent with the rules of ICPO-Interpol.

The Yerodia case[27] brought to the fore that when the General Secretariat processes information on a person and issues Red Notices for their arrest, ICPO-Interpol can become involved in situations that are not in conformity with international law. The General Secretariat processes information and issues notices mostly at the request of NCBs. Accordingly, Belgium's request for the search for the Democratic Republic of the Congo's Foreign Minister of the time, Mr. Yerodia, was processed and a Red Notice issued. Belgium's arrest warrant was challenged by the Democratic Republic of the Congo before the International Court of Justice. After examining the terms of the arrest warrant, the Court held that its issuance, as such, represented an act by the Belgian judicial authorities intended to enable the arrest on Belgian territory of an incumbent Minister for Foreign Affairs on charges of war crimes and crimes against humanity. The Court noted that the warrant did admittedly make an exception for the case of an official visit by Mr. Yerodia to Belgium and that Mr. Yerodia never suffered arrest in Belgium. The Court considered itself bound, however, to find that, given the nature and purpose of the warrant, its mere issue violated the erga omnes immunity which Mr. Yerodia enjoyed as the Democratic Republic of the Congo's incumbent Minister for Foreign Affairs. The Court accordingly concluded that the issue of the warrant constituted a violation of an obligation of Belgium towards the Democratic Republic of the Congo, in that it failed to respect the immunity of that Minister and, more particularly, infringed upon the immunity from criminal jurisdiction and the inviolability then enjoyed by him under international law. The Court also found that, as in the case of the warrant's issue, its international circulation from June 2000 by the Belgian authorities, given its nature and purpose, effectively infringed upon Mr. Yerodia's immunity as the Democratic Republic of the Congo's incumbent Minister for Foreign Affairs and was furthermore liable to affect the Democratic Republic of the Congo's conduct of its international relations. The Court concluded that the circulation of the warrant, whether or not it significantly interfered with

[27] I.C.J. Reports 2002.

Mr. Yerodia's diplomatic activity, constituted a violation of an obligation of Belgium towards the Democratic Republic of the Congo, in that it failed to respect the immunity of the incumbent Minister for Foreign Affairs of the Democratic Republic of the Congo and, more particularly, infringed upon the immunity from criminal jurisdiction and inviolability then enjoyed by him under international law.

Following the International Court of Justice's ruling in the Yerodia case, the ICPO-Interpol Rules on the Processing of Information for the Purposes of International Police Cooperation currently contain a specific provision requiring the General Secretariat to verify whether information processed by an NCB or other authorized entity complies with the laws existing in its country and whether it is consistent with the international conventions to which the source country is a party (article 10:1(5)). It became necessary to explicate this rule, because in the Yerodia case, the General Secretariat issued Red Notices further to Belgian arrest warrants which were later found to be inconsistent with Belgian obligations under international law.

Paragraph 3

According to the commentary on draft article 4, paragraph 3, by not making application of the rules of the organization the only criterion for establishing which functions are entrusted to each organ or agent, the wording of said paragraph is intended to leave the possibility open that, in exceptional circumstances, functions may be considered as given to an organ or agent even if this could not be said to be based on the rules of the organization.

The ICPO-Interpol General Secretariat invites the Commission to take the following into account.

As is acknowledged by the Commission in footnote 303, international organizations are governed by the "principle of speciality". This principle poses a bar to what tasks an organization may accept from third parties. It seems to follow from the advisory opinion on South-West Africa — Voting Procedures,[28] that the principle of expressio unius est exclusio alterius applies when an extra-constitutionally conferred power requires an organ to act in a manner which conflicts with the major purpose or fundamental structure of the organization.[29]

In the case of ICPO-Interpol, article 41, third paragraph of the Constitution, clearly states that, with the approval of the General Assembly or the Executive Committee, the Secretary-General may only accept duties which are within the scope of the activities and competence of the organization from other international institutions or organizations or in the application of international conventions. This expresses the clear wish not to involve the organization in activities which are beyond its stated mission in article 2 or prohibited under article 3 of the Constitution.

The effect of this provision is not only in the area of the scope of functions that may be accepted, but also that no function can be accepted by the Secretary-General, without the approval of the General Assembly or the Executive Committee.

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[28] I.C.J. Reports 1955, p. 79.

[29] See specifically on the application of this maxim to the extra-constitutional conferment of powers E. Lauterpacht, *The Development of the Law of International Organization by Decisions of International Organizations*, 152 RdCADI 1976, pp. 436-437 and 406.

The condition of approval by the General Assembly or the Executive Committee ensures that the internal allocation of powers is respected. A "specialization principle" applies in that regard.[30] It means that, as each organ has been endowed by the Constitution with a particular mission or range of special tasks with corresponding explicit means and powers, it would not be compatible with that division of functions among organs, if functions may be considered as being given to an organ or agent even if this could not be said to be based on the rules of the organization.

Another effect of article 41, third paragraph, of the Constitution is that the other organs of ICPO-Interpol may not accept duties from third parties. Moreover, article 41, third paragraph, of the Constitution implies that the Secretary-General cannot accept duties from national Governments; he can only accept duties from other international institutions or organizations or in the application of international conventions. This is to preserve the international character of the organization, in general, and of the Secretary-General, in particular.[31]

Based on the foregoing, the ICPO-Interpol General Secretariat appeals to the Commission to study further the possibility that it wishes to leave open in order to permit that, in exceptional circumstances, functions may be considered as being given to an organ or agent even if this could not be said to be based on the rules of the organization.

International Monetary Fund

Our first comment on draft article 4 concerns the concept of "agent" that the draft articles and commentary seek to define.

As we have previously commented, the International Monetary Fund (IMF) considers that only acts of officials performed in their official capacity would be attributable to IMF. An act of another person external to IMF would not be attributable to the organization under general principles of international law, even where they were helping to carry out the functions of IMF unless IMF exercised effective control over that act or an appropriate organ of IMF ratified or expressly assumed responsibility for that act.

The IMF position is not inconsistent with the three advisory opinions of the International Court of Justice which are referred to in the commentary to draft article 4. Those were construing a different treaty that is worded differently than the IMF Articles of Agreement. Furthermore, while we fully support the results and the reasoning of those advisory opinions, we note that those opinions were concerned with State obligations to an international organization. Considering that these cases did not concern the responsibility of international organizations and that the Court there was construing only one of a multitude of treaties bearing on the responsibility of international organizations, we question the blanket reliance upon those three cases for the unqualified proposition in paragraph (4) of the commentary to the draft article 4 rule that what "was said by the International Court of Justice with regard to the United Nations applies more generally to international organizations".

[30] Cf. M. Bedjaoui, *The New World Order and the Security Council — Testing the Legality of Acts* (Dordrecht/Boston/London, Martinus Nijhof 1994), p. 12.

[31] See also articles 29 and 30 of the ICPO-Interpol Constitution.

Our second comment on this draft article concerns a suggestion implicit in paragraph (7) of the commentary to draft article 4. Paragraph (7) of the commentary suggests that since the discussion of ultra vires conduct of an organ is set out in draft article 6, draft article 4 deals with conduct by an organ that is not ultra vires, but is still wrongful.

If the conduct of an organ is not ultra vires, then that conduct must have been undertaken pursuant to powers expressly provided for in, or necessarily implied from, the organization's charter. To suggest that acts authorized by and consistent with an organization's charter are wrongful suggests that the organization's charter is itself contrary to some higher international obligations. We can accept this only in cases involving breaches of peremptory norms of international law, but we find no support for such a proposition with regard to ordinary norms of international law. Accordingly, we recommend that the Commission reconsider or provide authority for its suggestion that the acts of organs of an organization that are not ultra vires can nonetheless be considered wrongful under ordinary norms of international law.

Organization for the Prohibition of Chemical Weapons

[With respect to draft article 4 (4), q]uestions can arise as to whether an alleged practice is an "established practice" of the particular organization. A footnote explaining the circumstances in which an alleged practice would be deemed to be an "established practice", or otherwise, would thus be helpful. For instance, such practice must be consistent with the context of the formal sources of rules enumerated in the provision.

United Nations Secretariat

The commentary in chapter V of the International Law Commission draft report incorporates some of our comments contained in our letter to you of 3 February 2004, and with one exception we have no further comments. In footnote 267, we suggest that reference be added to Security Council resolution 1272 (1999) of 25 October 1999, which decided: "to establish, in accordance with the report of the Secretary-General, a United Nations Transitional Administration in East Timor (UNTAET), which will be endowed with overall responsibility for the administration of East Timor and will be empowered to exercise all legislative and executive authority, including the administration of justice".

F. Draft article 5 — Conduct of organs or agents placed at the disposal of an international organization by a State or another international organization

8. Draft article 5, as provisionally adopted by the Commission at its fifty-sixth session, reads as follows:

"Article 5

"Conduct of organs or agents placed at the disposal of an international organization by a State or another international organization

"The conduct of an organ of a State or an organ or agent of an international organization that is placed at the disposal of another international

organization shall be considered under international law an act of the latter organization if the organization exercises effective control over that conduct."[32]

International Criminal Police Organization

Seconded officers

ICPO-Interpol employs a significant amount of seconded officials from national administrations. It can also employ officials loaned by international organizations. During their period of secondment, seconded officials are international officials acting exclusively in the interest of ICPO-Interpol. All seconded officials are subject to ICPO-Interpol Staff Regulations and Staff Rules, and to the Staff Instructions by the Secretary-General, under whom they are placed and to whom they are responsible during their secondment. Therefore, on taking up their duties, they sign a declaration of loyalty to ICPO-Interpol.

As, according to the ICPO-Interpol rules, seconded officials are de facto and de jure staff members, the attribution of their conduct would be covered by draft article 4, and not by draft article 5.

Liaison officers of other international organizations

It would appear that the situation with regard to liaison officers from other international organizations, placed at the General Secretariat, requires consideration. It is not entirely clear whether it is the intention for draft article 5 to cover such situations. If so, the ICPO-Interpol General Secretariat would like to petition the Commission to take the following consideration into account.

Liaison officers are exchanged pursuant to cooperation agreements with other organizations. Thus, in the cooperation agreement between Europol and ICPO-Interpol, parties agree that the cooperation as laid down in the cooperation agreement may be enhanced through either or both parties stationing (one or more) liaison officer(s) with the other. The liaison officers' tasks, rights and obligations as well as details regarding their stationing will be laid down in a memorandum of understanding to be concluded between the Director of Europol and the Secretary-General of Interpol. The parties will arrange for all necessary facilities, such as office space and telecommunications equipment, to be provided to such liaison officers within their premises. The costs of telecommunication shall be borne by the sending party. The archives of the liaison officer shall be inviolable from any interference by the other party's officials. These archives shall include all records, correspondence, documents, manuscripts, computer records, photographs, films and recordings belonging to or held by the liaison officer. Each party shall permit the liaison officer of the other party, within its own premises, to communicate freely for all official purposes and protect his right to do so. The liaison officer(s) shall have the right to use codes and to dispatch and receive official correspondence and other official communications by courier or in sealed bags, subject to the respective privileges and immunities applicable. Each party shall ensure that its liaison officer(s) has speedy access to its own information, which is necessary to fulfil his tasks while stationed at the other party.

[32] *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 10* (A/59/10), para. 71.

The foregoing supports the view that liaison officers of other international organizations are neither officers of ICPO-Interpol, nor are they placed at the disposal of ICPO-Interpol. It follows from this that the conduct of those liaison officers must be attributed to the organization they represent under draft article 4.

National officers made available to incident response teams

During the last two years, ICPO-Interpol has sent 13 incident response teams to 12 different countries. Assume that there is a major criminal incident or that terrorists strike somewhere in the world. ICPO-Interpol will offer to send a team to the site of the attack in order to provide support to the Interpol country concerned and to ensure that wanted persons notices are issued, databases are checked, relevant warnings are issued and analytical reports are generated where appropriate.

Obviously, as long as such incident response teams consist of ICPO-Interpol General Secretariat staff, no issue would arise under draft article 5. However, several of the incident response teams included national officers lent to ICPO-Interpol for a particular mission. In such cases, should those officers qualify as agents of ICPO-Interpol within the meaning of draft article 4, or do the draft articles consider them as agents placed at the disposal of ICPO-Interpol, within the meaning of draft article 5?

International Monetary Fund

As noted earlier in this response, we agree that attribution should be determined as in draft article 5, by the factual question of effective control over the conduct, regardless of whether the conduct was requested or authorized by another person.

G. Draft article 6 — Excess of authority or contravention of instructions

9. Draft article 6, as provisionally adopted by the Commission at its fifty-sixth session, reads as follows:

"Article 6

"Excess of authority or contravention of instructions

"The conduct of an organ or an agent of an international organization shall be considered an act of that organization under international law if the organ or agent acts in that capacity, even though the conduct exceeds the authority of that organ or agent or contravenes instructions."[33]

International Criminal Police Organization

As explained in paragraph 3 of the commentary on draft article 6, the wording of draft article 6 closely follows that of article 7 of the draft articles on the responsibility of States. In paragraph 1 of the commentary, it is stated that the draft article covers both the situation of excess of authority or contravention of

[33] *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 10* (A/59/10), para. 71.

instructions by an organ or agents as well as when the act exceeds the competence of the organization. The ICPO-Interpol General Secretariat wonders whether the notion expressed there is suitable for international organizations. Indeed, none of the examples derived from the practice of international organizations mentioned by the Commission involve a case of attribution of conduct that exceeds the area of competence of an organization.

To the extent that draft article 6 deals with situations where organs or agents act ultra vires by disregarding the internal division of function between the organs (usurpation of powers), but does not exceed the competence of the organization, the proposed rule is understandable. However, when the ultra vires act exceeds the competence of the organization, the proposed rule becomes less persuasive.

Article 7 of the draft articles on the responsibility of States departs from the premise that States possess general competence. Hence, in the case of States, the "principle of speciality" does not play any role in article 7 of the articles on the responsibility of States. However, as the Commission acknowledges, international organizations do not, unlike States, possess general competence. They are governed by the "principle of speciality", which means that they are invested by their creators with powers, the limits of which are a function of the common interests whose promotion those creators entrust them.[34]

It is clear from the principle of speciality — as applied by the International Court of Justice — that an organization can only claim entitlements and exercise procedural rights before international tribunals, to the extent and as long as the organization remains within its statutory area of competence. Logically, it also follows that international organizations cannot be held responsible for actions outside their area of competence, without any qualification.

The ICPO-Interpol General Secretariat therefore invites the Commission to consider adding a paragraph to draft article 5. Such provisions could possibly use some inspiration derived from article 46 of the 1986 Vienna Convention on the Law of Treaties. Under article 46, paragraph 2, of the 1986 Vienna Convention, an international organization may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of the rules of the organization regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of fundamental importance. A violation is manifest if it would be objectively evident to any State or any international organization conducting itself in the matter in accordance with the normal practice of States and, where appropriate, of international organizations and in good faith.

Transgression of an organization's mandate would qualify as objectively evident to any country or any international organization conducting itself in the matter in accordance with the normal practice of countries and, where appropriate, of international organizations and in good faith.

[34] *Legality of the use by a State of nuclear weapons in armed conflict*, I.C.J. Reports 1996, p. 78, para. 25.

International Monetary Fund

While we agree with the principle that an international organization may be bound, as to innocent third parties, by an ultra vires act of an organ or official, we believe article 6 should take account of one key exception, drawn from municipal law, which excuses the attribution of an agent's ultra vires conduct to the principal in cases where the injured party was (i) on actual or constructive notice about the ultra vires nature of the conduct and (ii) participated in such conduct. We believe this principle should be considered to be an exception to the provisions of draft article 6.

H. Draft article 7 — Conduct acknowledged and adopted by an international organization as its own

10. Draft article 7, as provisionally adopted by the Commission at its fifty-sixth session, reads as follows:

"Article 7

"Conduct acknowledged and adopted by an international organization as its own

"Conduct which is not attributable to an international organization under the preceding draft articles shall nevertheless be considered an act of that international organization under international law if and to the extent that the organization acknowledges and adopts the conduct in question as its own."[35]

International Criminal Police Organization

Here also, the principle of speciality would justify the consideration of a qualifying provision. It is not obvious that the LAN case[36] can properly be adduced in support of the principle draft article 7 purports to articulate. In that case, the European Community argued that the action in question was that of the European Community and that therefore the United States of America sued the wrong party, because the alleged breach was an obligation of the European Community, not of its members. In the event, that was also how that case was treated.[37] But even if the statement quoted by the Commission could be considered an example of acknowledgement, it should be kept in mind that the European Community based its assertion on the fact that the European Community has the exclusive competence in matters of tariff concessions and customs classification. Leaving aside the question of which would be the organ competent to acknowledge and adopt, the foregoing would support the view that only conduct acknowledged and adopted by an international organization, which is intra vires, can be attributed to an organization under draft article 7.

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[35] *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 10* (A/59/10), para. 71.

[36] EC-Computer Equipment, WT/DS62/R, WT/DS67/R and WT/DS68/R of 5 February 1998.

[37] See R. S. J. Martha, "The Capacity to Sue and Be Sued under WTO-Law", 3 *World Trade Review*, 2004, pp. 41-42.

I. Reference to the "rules of the organization"

Democratic Republic of the Congo

In line with the meaning of article 2, paragraph 1, of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations ("rules of the organization" means, in particular, the constituent instruments, decisions and resolutions adopted in accordance with them, and established practice of the organization), a general rule on attribution of conduct to international organizations should in principle contain a reference to the "rules of the organization".

This position is based on the principle of speciality governing international organizations and on the principle that the organization's international legal personality cannot be asserted vis-à-vis third States. Given that the international organization is founded on a treaty which itself is of relative effect ("res inter alios acta"), its existence as an autonomous entity cannot theoretically be asserted vis-à-vis third States to that treaty. Moreover, organizations may exercise the legal powers vested in them only within the limits and for the fulfilment of the mandate set out in their consituent instrument.

J. Definition of "rules of the organization"

Democratic Republic of the Congo

The Democratic Republic of the Congo is of the opinion that this definition is adequate.

However, as regards the conduct of organs of an international organization, the Democratic Republic of the Congo would like the Commission to examine in depth the treatment that should be given to the draft articles on organs established under bilateral agreements concerning the joint management of transboundary natural resources, such as transboundary watercourses, protected areas, etc.

K. Attribution of the conduct of a peacekeeping force to the United Nations or to contributing States

Democratic Republic of the Congo

It is a fact that any action or omission by an organization that is incompatible with the rules of general customary law or the provisions of a treaty to which it is a party constitutes an internationally wrongful act that will be attributable to that organization.

Indeed, Article 24 of the United Nations Charter confers on the Security Council primary responsibility for the maintenance of international peace and security. In carrying out this weighty responsibility, the Council acts on behalf of the States Members of the Organization, which constitutes a true delegation of power.

In the absence of an "international army", as provided in Article 43 of the Charter, the Security Council itself cannot undertake an operation of military

coercion within the meaning of Article 42. However, it alone can and must lend its authority, pursuant to Article 39 or Article 42 in fine, to measures taken by Member States to give effect to its decisions. Specifically, Article 42 of the Charter may be implemented in two ways: either through the contribution of an armed force that depends directly or exclusively on the Security Council or through the creation of an army consisting of national contingents and placed under United Nations command.

In principle, the conduct of peacekeeping forces is in both cases attributable to the United Nations, as the Council has authority over national commands and the soldiers themselves receive orders only from national commands.

It is also important to stress that Article 47 of the Charter established a Military Staff Committee to advise and assist the Security Council on all questions relating to the Security Council's military requirements for the maintenance of international peace and security, the employment and command of forces placed at its disposal, the regulation of armaments and possible disarmament.

Indeed, article 39 of the general principles governing the organization of armed forces made available to the Security Council provides as follows: "The command of national contingents will be exercised by commanders appointed by the respective member nations. These contingents will retain their national character and will be subject at all times to the discipline and regulations in force in their own national armed forces."

Thus, if crimes committed during peacekeeping operations are defined as crimes under the Rome Statute of the International Criminal Court, while the United Nations may be held financially responsible for damages caused by the armed forces responsible, their criminal responsibility would be governed either by the Rome Statute or by national laws.

However, given the special nature of these missions, the Democratic Republic of the Congo believes that the Commission should continue its work with a view to making the necessary adjustments to the regime governing the responsibility of peacekeeping operations.

It nonetheless suggests that this type of responsibility should be regulated through practical arrangements between the United Nations and host countries (such as the agreement between the United Nations Organization Mission in the Democratic Republic of the Congo (MONUC) and the Government of the Democratic Republic of the Congo) on possible damages caused by the activities of peacekeeping forces in their respective territories.

L. Breaches of obligations of an international organization towards its member States or its organs — scope of study

European Commission

With regard to question (a) whether the International Law Commission should consider in its study breaches of obligations that an international organization may have towards its member States or its agents, the European Commission would counsel for caution not to overburden the project. In our view, the relationship between an organization and its member States or agents is foremost governed by the rules of the organization. These rules do not only define the conditions under

which an obligation of the organization may arise (primary rules). Often these internal rules would also set up a special system of responsibility (secondary rules). Even if the International Law Commission attempted to address only relevant secondary rules, it would have to undertake an in-depth study of these in order to find out whether these rules completely govern the subject matter as leges speciales or whether there would be room for useful residual general rules. In the framework of the European Community, it should be kept in mind that the scope of Community obligations both vis-à-vis its member States under article 10 EC and vis-à-vis its agents under the staff regulation adopted under article 282 EC is vast and raises complex legal questions not apt for the present codification project.

International Criminal Police Organization

(i) The essential difference with the law of State responsibility

The issue of whether the Commission should include the rules of international organizations in the scope of its works calls for some comments regarding an important difference between the law of State responsibility and the law of responsibility of international organizations.

As confirmed by the Permanent Court of International Justice in the Polish Upper Silesia case, municipal laws, including the national constitutions, are, from the standpoint of international law and of international tribunals, merely facts which express the will and constitute the activities of States.[38] However, as was recently illustrated in the BIS Repurchase of Private Shares Award,[39] the situation of international organizations is totally different. Issues implicating the organic principles or internal governance of international organizations are governed by international law.[40] The obligations resting upon international organizations by virtue of their constituent instruments and the secondary law of international organizations are international legal norms in the same way as the obligations from the treaties to which an organization may be a party and other applicable rules of customary international law.[41] Simply, there cannot exist an internal legal order of international organizations which is autonomous from the law to which it owes its existence. It is therefore difficult to conceive a study of the responsibility of international organizations which disregards the responsibility because of breaches of the rules of international organizations. This is not to say that the study should cover the relations between organs of the organization. The rules of the organizations are only relevant to the law of international responsibilities as far as they relate to the relations governed by international law between the international organization as an international legal person and third parties, whether these are States, other international organizations, other entities, or natural persons.[42]

The constituent instruments of international organizations, which are embodied in international agreements, are, according to the International Court of

[38] *Polish Upper Silesia*, P.C.I.J., series A, No. 7, p. 19.

[39] Permanent Court of Arbitration, partial award of 22 November 2002, http://www.pca-cpa.org/ENGLISH/RPC/BIS/EPA.pdf.

[40] Ibid., para. 123.

[41] See C. F. Amerasinghe, *Principles of the Institutional Law of International Organizations* (Cambridge University Press, 1996), p. 326.

[42] See P. Klein, *La responsabilité des organisations internationales* (Brussels Editions Bruylant, 1998), pp. 22-29.

Justice, multilateral treaties, albeit of a particular type.[43] One of these particularities is that those constituent instruments create new subjects of law endowed with certain autonomy. Based on this autonomy, the new subject can act or omit to act in a way that is in breach of both its constituent instrument and the secondary law under the instrument from which it derives its legal existence, or general international law and particular international law applicable to international organizations. This assertion is based on the following statement of the International Court of Justice:

> "International organizations are subjects of international law and, as such, are bound by any obligation incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties."[44]

Thus, unlike when States breach their own domestic law, any breach of its own rules by an international organization is by definition a breach of an international obligation of the organization, within the meaning of draft article 3, paragraph 3 (b). The existence of such a breach can give rise to the responsibility of organizations towards third parties.

(ii) The international character of staff relations

As regards the responsibility of international organizations in relation to their staff members, it should be recalled that administrative tribunals have continuously emphasized the independence of international organizations, which entails that international organizations are not subject to the laws of another international organization or to any national law. In the specific situation of ICPO-Interpol, in a case where the applicant invoked both the law of other organizations as well as the law of one country, the International Labour Organization Administrative Tribunal (ILOAT) ruled that "Interpol is an international organization and not subject to any national law" and that "Interpol is an independent international organization; the parties cite no agreement and do not even mention the existence of any coordinating body that would warrant comparison; and even if the plea succeeded it would not mean quashing the impugned decisions anyway ..."[45]

One consequence of this independence is that the relationship between international organizations and their staff is inherently international. Accordingly, any national court would lack jurisdiction rationae personae and rationae materiae to deal with staff disputes of international organizations.[46] In the case of ICPO-Interpol this is expressly stated in article 30 of ICPO-Interpol's Constitution.

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[43] See for example, *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* (*Request by WHO*), I.C.J. Reports 1996, pp. 74-75; see for an extensive examination of the case law of the ICJ prior to 1996, T. Sato, Evolving Constitutions of International Organizations (The Hague/London/Boston, Kluwer Law International, 1996).

[44] *Interpretation of the Agreement of 25 March 1951 between WHO and Egypt*, I.C.J. Reports 1980, pp. 890-900, para. 37.

[45] ILOAT, Judgment No. 1080 of 29 January 1991, consideration 12.

[46] I. Seidl-Hohenveldern, *Avis concernant l'incompétence des tribunaux, nationaux pour régler des litiges opposant L'Organisation internationale de police criminelle — Interpol à ses agents*, 26 May 1986.

Accordingly, when staff members invoke the responsibility of an international organization, tribunals also look at the constituent instrument and the decisions and practice of the organization concerned, in order to determine the responsibility of the organization. The decision of the World Bank Administrative Tribunal in the de Merode case constitutes an instructive example. In that case, the Tribunal looked at the constituent instrument of the World Bank, its by-laws and certain manuals, notes and statements issued by the management as well as certain other sources, including general principles, in order to adjudicate the case.[47]

(iii) Actions affecting private parties

The rules of the organization can also play a determining role in defining the responsibility of an international organization in relation to private parties. The BIS Repurchase of Private Shares Award[48] illustrates this point very clearly. In that case, the tribunal subscribed to the view that, in order to establish whether the international organization concerned committed a wrongful act against its private shareholders, it was necessary to examine the consistency of the act under the constituent instruments as well as under the principles of international law that might apply. Accordingly, the arbitral tribunal first answered the question as to whether the amendment of the constituent instrument, which eliminated the possibility of private shares in the organization, was consistent with the rules of the organization. Only after answering that question affirmatively, the tribunal examined whether the repurchase of the shares took place in a way consistent with the international law rules concerning expropriation and compensation, the human right principle of peaceful enjoyment of property and the principle of non-discrimination.

It would therefore be very useful if a definition of an internationally wrongful act were provided that also encompassed breaches by an international organization of its own rules. This is all the more necessary as there exist international organizations whose rules impose standards of treatment on the organization as such (thus not obligations on any particular organ), whose purpose is to protect subjective rights of third parties, or whose operations affect third parties adversely.

In the case of ICPO-Interpol, article 2, paragraph 1, of the Constitution requires the organization to respect the spirit of the Universal Declaration of Human Rights in all its actions. This provision is unique to ICPO-Interpol,[49] and imports the totality of the rights listed in the Universal Declaration and their elaboration in various human rights instruments into the rules of ICPO-Interpol. The organization

[47] *De Merode*, WBAT Reports [1981], Decision No. 1.

[48] Permanent Court of Arbitration, partial award of 22 November 2002, http://www.pca-cpa.org/ENGLISH/RPC/BIS/EPA.pdf.

[49] But see C. H. M. Waldock, *General Course on Public International Law*, 106 RdADI, 1962-II, pp. 198-199, on how the Declaration became accepted as part of the "Law of the United Nations".

has therefore taken several initiatives to promote the observance of human rights in its various fields of activities.[50]

ICPO-Interpol must also respect human rights in its own operations. As one main activity of ICPO-Interpol consists of the processing of information for the purpose of international police cooperation, ICPO-Interpol activities come within the range of the privacy of persons protected by the fundamental right enshrined in article 12 of the Universal Declaration. Steinberg v. International Criminal Police Organization et al[51] is a case in point. This case involved a United States citizen, who was the subject of an ICPO-Interpol notice describing him as a wanted international criminal who used the alias "Mark Moscowitz". On learning that the ICPO-Interpol General Secretariat was circulating the notice through the Interpol network, he notified the ICPO-Interpol General Secretariat twice and offered proof that the notice was erroneous. He alleged that despite the proof offered, the ICPO-Interpol General Secretariat continued to publish the notice and other statements associating him with "Mark Moscowitz" for over a year until, according to the complainant, it conceded that this association was erroneous. Steinberg sought general punitive damages for substantial injury he alleged he had suffered as a result of the organization's purportedly defaming notice.

The issue of the responsibility towards third parties for the breach of article 2 of the ICPO-Interpol Constitution lies at the roots of the Supervisory Board for the Control of Interpol's Archives (currently referred to as the Commission), which came into being when ICPO-Interpol renegotiated its headquarters agreement with France.

France claimed that the law of 6 January 1978 concerning information technology, files and freedoms was applicable to the nominal data stored at Interpol premises. Consequently, France argued that natural persons should have access to data concerning them, a right which could be exercised through the *Commission*

[50] At its 18th session in Berne, 1949, the General Assembly adopted resolution No. 3, which laid down that "all acts of violence or inhuman treatments, that is to say, those contrary to human dignity committed by the police in the exercise of their judicial and criminal police duties, must be denounced to justice". The resolution also recommended that "in all the police training schools, special importance be attached to the complete recognition of the right of all persons suspected of an infringement of the penal law, or any other persons, to receive a fair and humane treatment". This resolution was followed, at the 45th General Assembly session (Accra, 1976), by the presentation of report No. 20 on the work of the United Nations concerning the preparation of a code of conduct for law enforcement officials. More recently, resolution No. AGN/63/RES/16, adopted by the General Assembly at its session in Rome (1994), recommended that the organization's members encourage the adoption of measures to ensure that training on human rights was provided in police colleges. A circular letter was subsequently sent asking Interpol countries to keep the General Secretariat informed of all developments concerning the implementation of this resolution. It should also be pointed out that ICPO-Interpol works in close cooperation with the United Nations Commission on Human Rights; the Commission consults Interpol about the texts it adopts. A number of international instruments have also been adopted, in order to give practical expression to the Universal Declaration of Human Rights and form a corpus of international criminal law by defining crimes which constitute infringements of human rights. In the application of article 2 of its Constitution, the organization follows the norms set out in such texts and has always recommended that its member States ratify these international instruments.

[51] United States Court of Appeals, District of Columbia, 23 October 1981, 217 U.S. App. D.C.; 672 F.2d 927. For a discussion of this case see A. Reinisch, *International Organizations before National Courts* (Cambridge, 2000), pp. 28, 50, 152ff, 170.

nationale de l'informatique et des libertés, which was set up in application of the above-mentioned law and given powers to control computerized files in France.

ICPO-Interpol argued that this law should not be applicable to the police information processed by the General Secretariat for the following two reasons:

(a) Information sent in by Interpol countries does not belong to Interpol, which merely acts as a depository; applying a national law to such information would give that law an extraterritorial status;

(b) Applying the law of 1978 to Interpol files in France could hamper international police cooperation, since certain countries would prefer not to communicate police information which could be disclosed to French bodies.

Much was clearly at stake for both parties. France was unwilling to strengthen Interpol status on its territory without some kind of guarantee concerning the processing of personal data protected by the law of 1978, and the organization was keen to ensure the smooth functioning of international police cooperation through its channels.

These conflicting views were reconciled as a result of both parties' commitment to data protection, both in order to protect international police cooperation and to protect individual rights (article 2 of the Interpol Constitution states that its action is carried out in the spirit of the Universal Declaration of Human Rights).

The consensus was made official on 3 November 1982 with the signing of a new Headquarters Agreement between France and Interpol, which came into force on 14 February 1984 and to which an exchange of letters is appended. These texts form the basis of the system for the control of Interpol files.

By signing the text, France agreed not to apply the law of 1978 to Interpol files. The agreement guarantees the inviolability of Interpol archives and official correspondence (articles 7 and 9 of the Headquarters Agreement) and provides for internal control of Interpol archives by an independent body rather than by a national supervisory board (article 8).

In accordance with the exchange of letters between Interpol and the French authorities, which invites Interpol to set up a Supervisory Board and define its function, the organization adopted the Rules on International Police Cooperation and on the Control of Interpol's Archives in 1982. The purpose of these Rules, as stated in article 1(2), is "... to protect police information processed and communicated within the ICPO-Interpol international police cooperation system against any misuse, especially in order to avoid any threat to individual rights". This is the text which set up the Board whose English name was changed to the present "Commission for the Control of Interpol's Files" in 2003.

ICPO-Interpol developed an elaborate regime to ensure that its processing of information for the purpose of information for the purpose of international police cooperation does not wrongfully encroach on the privacy of persons.[52] The question is whether in cases where a breach nevertheless occurs, such a breach comes within the scope of draft article 3, paragraph 1.

If the answer is positive, which seems to be the case, this should be made clear somewhere. As said before, the rules of the organization are by definition international. Therefore it seems that the law of obligations cannot validly make a distinction between obligations resulting from external engagements and obligations resulting from the internal rules of the organization. Rather, it would seem that the responsibility will be determined by the substance of the obligation that is breached. If the purpose of the obligation is to protect the subjective rights of third parties, the consequences of breaches cannot be governed by anything other than the law of responsibility for acts that are wrongful under international law.

ICPO-Interpol acts under the same assumption, as far as it concerns the precepts of article 3 of its Constitution. Although not directly phrased as a standard of treatment of private parties, failure to comply with article 3 can have major repercussions for the person on whom ICPO-Interpol keeps nominal data processed or is the target of diffusion through the ICPO-Interpol network of a Red Notice.

[52] Rules on the Processing of Information for the Purposes of International Police Cooperation, adopted by the ICPO-Interpol General Assembly at its 72nd session (Benidorm, Spain). The current rules replace the rules that evolved since 1982. In 1982, at its 51st session (Torremolinos, Spain), the General Assembly adopted the "Rules on International Police Cooperation and on the Internal Control of Interpol's Archives" (resolution AGN/51/RES/1), which provide, inter alia, that information shall be processed "[...] in an electronic data processing system consisting of a processing centre installed at the General Secretariat [...]". In 1987, at its 84th session (St. Cloud, France), the Executive Committee adopted the "Rules on the Deletion of Information held by the General Secretariat", having been delegated by the General Assembly at its 55th session, held in Belgrade (resolution AGN/55/RES/2). In 1990, at its 59th session (Ottawa), the General Assembly adopted the "Rules Governing the Database of Selected Information at the ICPO-Interpol General Secretariat and Direct Access by NCBs to that Database" (resolution AGN/59/RES/7). In 1996, 1998 and 2000, at its 65th session (Antalya, Turkey), 67th session (Cairo) and 69th session (Rhodes, Greece), the General Assembly adopted three resolutions, respectively on "ACIU and crime analysis" (AGN/65/RES/16), "Interpol's crime analysis training strategy and programme" (AGN/67/RES/9) and the "Development of a strategic criminal intelligence capability at the Interpol General Secretariat" (AGN/69/RES/4).

Article 3 bars ICPO-Interpol from engaging in "activities of a political, military, religious or racial character".[53]

On a daily basis, the ICPO-Interpol Office of Legal Affairs, one way or the other, becomes involved with issues raised either by law enforcement bodies urging the General Secretariat to assist in the search for a certain person or by parties who are dissatisfied with the fact that ICPO-Interpol has opened a file on them, which in many cases also includes an international wanted notice, the famous Red Notices. The Office of Legal Affairs as well as the Commission on the Control of ICPO-Interpol Files must frequently also deal with challenges by individuals regarding the services rendered by the General Secretariat to the affiliated countries, when it affects such individuals. Typically, an individual would claim that he is being wanted for the reasons mentioned in article 3 of Interpol's Constitution, and that therefore ICPO-Interpol should not assist the requesting country.

These complaints become all the more adamant when the subject of an ICPO-Interpol police file or wanted notice experiences hindrance in his or her international mobility, such as the rejection of a request for a visa, denial of a landing, and expulsion or deportation. Sometimes these hindrances are alleged to cause damages because of missed business opportunities.

In practice individuals often claim that, based on article 3 of the ICPO-Interpol Constitution, they have a right to be protected against ICPO-Interpol assistance to the prosecution of "political offences". Whenever ICPO-Interpol is persuaded that its cooperation to apprehend a certain person is not in conformity with the foregoing, it must cease its cooperation with the requesting country on the file and cancel any request to its membership for cooperation with regard to information on or the capture of the person in question. ICPO-Interpol may also temporarily cease,

[53] Article 3 of the ICPO-Interpol Constitution has a specific historical background. In the immediate post-war period, the ICPO-Interpol predecessor, the International Criminal Police Commission (ICPC), adopted a position of neutrality by refusing to become involved in cases of a political, religious or racial nature. In his opening speech to the Brussels Conference in June 1946, President Louwage said that by scrupulously adhering to that principle, the Commission had succeeded in gaining the respect of administrative and judicial authorities in all member countries. This position was also in keeping with the development of extradition law — both national and international — during the nineteenth and early twentieth centuries and, in particular, with the concept of "political offence". Despite the fact that the ICPC statutes adopted in 1946 contained no provisions limiting the scope of the organization's action in cases of a political, racial or religious nature, in practice, the organization maintained its position. In 1948, the phrase "to the strict exclusion of all matters having a political, religious or racial character" was added to the end of article 1(1) of the statutes. The then Secretary-General of ICPC described the lack of any formal provision on the matter as a "serious omission". In his report to the General Assembly, he stated that "the strict limitation of our action within the realm of common law [sic] has enabled us to extend the influence of the ICPC without opposition, and we consider that its future hangs largely on the strict observance of this neutrality". Thereafter, article 1 read as follows: "The purpose of the International Criminal Police Commission is to ensure and officially promote the growth of the greatest possible mutual assistance between all criminal police authorities, within the limits of the laws existing in the different States, to establish and develop all institutions likely to contribute to an efficient repression of common law crimes and offences, to the strict exclusion of all matters having a political, religious or racial character". In 1956, when the Constitution of ICPO-Interpol was being drafted, this provision was taken up and became what is now article 3: "It is strictly forbidden for the organization to undertake any intervention or activities of a political, military, religious or racial character".

i.e. suspend, the cooperation with the requesting member on the file, if it has reason to believe that the requested assistance is possibly not in conformity with the above prescriptions of the Constitution.

As said before, it would therefore be very useful if a definition of an internationally wrongful act were provided that also encompasses breaches by an international organization of its own rules.

(iv) Actions affecting countries and other international organizations

In the ICPO-Interpol set-up, it can also happen that an organ acts in violation of a rule of an organization that has been designed in order to protect the interest of the Interpol countries. In this regard, it is important to note that ICPO-Interpol rules on the processing of police information balance the requirements of international police cooperation against the need to protect data and individuals' basic rights in conformity with articles 2 and 3 of the Constitution. Therefore, the following two fundamental principles have been taken into consideration during preparation of the aforementioned rules: respect for national sovereignty and recognition of the key role played by the National Central Bureaus, contemplated in article 32 of the ICPO-Interpol Constitution.

Thus the relevant provision in the rules sets out the obligations incumbent upon the entities of the Interpol countries that communicate information to the ICPO-Interpol General Secretariat, with a view to processing that information within the cooperation system set up by ICPO-Interpol. This serves as a reminder of the obligation to respect the purposes for which information is processed (these purposes being based on the provisions of articles 2 and 3 of the organization's Constitution) and the main obligation to provide accurate information and ensure that it is updated whenever necessary.

Respect for national sovereignty is expressed in the ownership of the information supplied to ICPO-Interpol by Interpol countries, through their National Central Bureaux and other authorized entities. Lastly, the relevant provision in the rules states that the entities communicating items of information may, at any time, restrict access rights to that information. In this connection, the relevant provision in the rules lays down the procedures for informing entities which have communicated information whenever a new entity may become a recipient of the said information. This enables the source of the information to decide whether the new entity may have access to the information it has communicated.

The rules impose on the ICPO-Interpol General Secretariat the obligation to ensure that the processing of information through the channels of the organization is in conformity with the condition stipulated and only for the authorized purposes. Failure by the ICPO-Interpol General Secretariat to observe the rules that have been designed to protect the interests of Interpol countries could engage ICPO-Interpol responsibility, even though the rule pertains to the internal legal order of the organization. Accordingly, the dispute settlement mechanism contemplated in article 23 of the ICPO-Interpol Rules on the Processing of Information for the Purposes of International Police Cooperation, is partly premised on the assumption that the entities through which the Interpol countries act with regard to the processing of information for international policing purposes, should have a remedy against ICPO-Interpol.

International Monetary Fund

The draft articles should clearly state that relations between an international organization and its members and agents that are covered under the organization's charter are outside their scope. Such relations are governed by the rules of each organization.[54] When an international organization acts in accordance with its charter, it would not be subject to responsibility for doing so under general international law principles (that are implicitly referred to but not set forth in the substance of the draft articles), but its responsibility must be determined under its own charter.

The reasons for these conclusions are related to the nature of the rules of international organizations, and to the differences between States and international organizations and among international organizations.

The rules of an international organization, such as IMF, are both internal in scope and international in nature. They are internal in scope because they govern relations between the organization and its members, among the members (in their capacity as members) and between the organization and its organs and agents. They are international in nature because they have been agreed to by treaty among the organization's member States[55] or have been developed pursuant to such agreement. For this reason, it would be inappropriate to treat the rules of an international organization as equivalent either to domestic law or as subordinate to general rules of international law, in the sense in which those terms are used with reference to States.[56] Therefore, as a body of law, the rules of international organizations are sui generis.

It should also be recognized that the rules of an organization are lex specialis as between the organization and its members and agents and among its members. It is therefore not possible to suggest, as has been done in the commentary to draft article 3, that in some cases (other than involving obligations of a peremptory nature) general international obligations might prevail over the rules of an organization.[57] Such a suggestion ignores the international agreements between the organization's members regarding the exclusive application of the laws governing their relations and it suggests that lex generalis prevails over lex specialis.

In addition, international law recognizes that international organizations are "unlike States" in that they "do not possess a general competence".[58] Whereas "a

[54] Furthermore, in some international organizations the members have agreed to an exclusive mechanism to determine the scope of obligations under the organization's charter. For IMF, article XXIX of the Articles of Agreement provides such an exclusive mechanism.

[55] On the issue of organizations created by other international organizations, or whose members are international organizations, please see the comments on draft article 2, below.

[56] This treatment, with which we do not agree, has been attempted in the commentary to draft article 3 (chapter IV of the Commission's report).

[57] Practice has demonstrated, in particular, that one international organization is not subject to rules of international law that may be promulgated by other international organizations, unless it has accepted those rules. For example, the 1947 Agreement between the United Nations and IMF recognizes that IMF is not bound by decisions of the Security Council under Articles 41 and 42 of the United Nations Charter, although its member States may be bound pursuant to Article 48 of the United Nations Charter. The Agreement provides that IMF is only obliged to "have due regard" for such decisions of the Security Council.

[58] *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, I.C.J. Reports 1996, at p. 76.

State possesses the totality of international rights and duties recognized by international law, the rights and duties of an entity such as the Organization *must depend* upon its purposes and functions as specified or implied in its constituent documents and developed in practice".[59] (Emphasis added.) Therefore, for international organizations, international responsibility must depend upon the organizations' purposes and functions as specified or implied in their constituent documents and developed in practice.

International organizations are also different from each other in purpose and in function; the constituent documents and the practices of these organizations are also necessarily different. These differences are particularly pronounced when dealing with relations between organizations and their members and agents, since those relations depend on the purpose and functions of each organization.

Since the rules of each organization reflect those differences in purpose and function, since those rules have been agreed to by member States as governing relations between the organization and its members and agents, and since those rules are lex specialis for the organization's legal relations, those rules alone govern relations between an international organization and its members and agents, including in circumstances where those relations might concern the breach of an international obligation the organization may have towards its members and agents. Accordingly, we believe that such relations are, and should be, outside the scope of the Commission's study.

United Nations Secretariat

With regard to the first question, in the absence of any indication as to the nature of the obligations breached by an international organization — other than its treaty obligations — this office is not in a position to express an opinion on whether the Commission should study the question, or what weight should be given to it in the general framework of its study on responsibility of international organizations.

World Intellectual Property Organization

For the purposes of addressing this question, the International Law Commission states that "rules of the organization" means "in particular: the constituent instruments, decisions, resolutions and other acts taken by the organization in accordance with those instruments; and established practice of the organization". It may be appropriate for the Commission to consider extending this definition to include a more general rubric as well, such as "established or generally accepted principles of international law". We agree with the statement that the legal nature of the rules of the organization in relation to international law is controversial. We also recognize that the definition of "rules of the organization" is in large measure modeled on that provided in article 2 (1) (j) of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations. Nevertheless, in our view, the relations between an international organization and its member States and between an international organization and its agents should be more generally governed by international law, an integral part of which is the rules of the organization. This

[59] *Reparation for Injuries Suffered in the Service of the United Nations*, I.C.J. Reports 1949, at p. 180.

would be consistent with draft article 4 (1), for example ("General rule on attribution of conduct to an international organization"), which uses "international law" as the standard for determining the general rule on attribution of conduct to an international organization. In this regard, we would also recommend that the Commission also consider breaches of obligations that an international organization may have towards its member States or its agents.

M. Necessity as a circumstance to preclude wrongfulness

European Commission

The European Community is aware that this ground has a basis in customary international law[60] and that article 25 on responsibility of States for internationally wrongful acts contains further guidance. States may, exceptionally, point to necessity to "safeguard an essential interest against a grave and imminent peril provided that this does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole". We observe that, in theory, this scenario may also apply to international organizations. However, such application must be operated with utmost care. For example, an environmental international organization may possibly invoke "environmental necessity" in a comparable situation where States would be allowed to do so,[61] provided that:

(a) It needs to protect an essential interest enshrined in its Constitution as a core function and reason of its very existence;

(b) This does not seriously impair an essential interest of other subjects of international law towards which the obligation exists, or the international community as a whole.

International Criminal Police Organization

Customary international law recognizes necessity as a circumstance precluding wrongfulness. But as pointed out by the International Court of Justice in the Reparation for Injuries case, the subjects of law in any legal system are not necessarily identical in their nature or the extent of their rights.[62]

The necessity exception evolved essentially in relations between States, and in ICPO-Interpol experience it has not been confronted with any situation to which the notion would apply. At the same time it must be conceded that necessity does not pertain to those areas of international law that, by their nature, are patently inapplicable to international organizations.[63] The ICPO-Interpol General Secretariat

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[60] I.C.J., *Gabcikovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, I.C.J. Reports 1997, p. 7 (40), § 51.

[61] See, e.g., I.C.J., *Gabcikovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, I.C.J. Reports 1997, p. 7 (41-46). The Court accepted that the concerns of Hungary for its natural environment in the region constituted an "essential interest" of that State, but it was not convinced that abandoning the project in disregard of Hungary's treaty obligations vis-à-vis Slovakia met a "grave and imminent peril".

[62] Advisory opinion, I.C.J. Reports 1949, p. 178.

[63] See P. Klein, *La responsabilité des organisations internationales* (Brussels, Editions Bruylant, 1998), pp. 416-418, for a projection of the notion of necessity on international organizations

therefore considers that the Commission should not exclude the notion from its study, but should examine whether the application of necessity to international organizations would require consideration of the distinguishing features of international organizations. It should be kept in mind that there exists a great variety of international organizations, which could imply that for certain types of organizations necessity might be suitable.[64]

It is recalled that, although it was found in the Russian Indemnity case that there was no circumstance precluding the wrongfulness of Turkey's default, it was accepted in principle that financial distress can constitute a circumstance precluding wrongfulness.[65] Unlike States and other territorial entities, generally international organizations do not possess jurisdiction over tax, and cannot therefore generate their own income. International organizations are dependent on the financial contributions of the participating countries. Should it happen that a significant number of countries fail to pay their contributions, a situation may arise in which an organization would not be able to meet its financial obligations. As proved by the demise of the International Tin Council,[66] unlike the case of States, insufficient funding can be a life-threatening situation for an international organization. This issue demands special attention in the codification and progressive development of the law of responsibility of international organizations, either under the heading, force majeure or "necessity",[67] or in an arrangement for dealing with the insolvency of international organizations.

International Monetary Fund

Although the Commission's question was specific to whether necessity precludes the wrongfulness of an act of an international organization, as a more general matter, one must first determine the circumstances in which the wrongfulness of an act could arise before turning to the circumstances that preclude the wrongfulness of such acts.

As stated above, the wrongfulness of an act of an international organization under its charter needs to be determined with reference to the rules of the organization. Hence, the question of whether necessity precludes the wrongfulness of an act must also be determined with reference to the rules of the organization.

We are unaware of any prior case involving the International Monetary Fund, or any other international organization, where the issue of necessity precluding the wrongfulness of an act was addressed. While this does not imply that necessity would not preclude the wrongfulness of an act in the case of all international organizations, the application of necessity to an international organization would

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[64] Cf. W. Riphagen, "The Second Round of Treaty Law", in *Liber Amicorum Pierre Pescatore* (Baden Baden, 1987), pp. 571-572.

[65] *Hague Court Reports* (J. B. Scott, ed.) (1916), pp. 298-328.

[66] See, inter alia, I. Seidl-Hohenveldern, "Failure of Control in the Sixth International Tin Agreement", in Niels Blokker & Sam Muller, *Towards More Effective Supervision by International Organizations — Essays in Honour of Henry G. Schermers*, vol. I (Dordrecht Boston London, Martinus Nijhoff Publishers, 1994), pp. 255-274, and the sources cited there.

[67] For a discussion of the classification of the Russian Indemnity case under the notion of necessity, see R. S. J. Martha, "Inability to Pay Under International Law and under the Fund Agreement", *Neth. Int'l L. Rev.* (1994), pp. 104-108, and also J. Crawford, *The International Law Commission's Articles on State Responsibility* (Cambridge University Press, 2002), p. 180.

also need to be related to the organization's purposes and functions. Incidentally, we have found it difficult to envisage situations in which necessity might preclude the wrongfulness of acts in the case of international organizations dealing essentially with international financial obligations.

The leading case on this subject in the area of State responsibility also provides little assistance. In the Gabcikovo-Nagymaros Project case,[68] the International Court of Justice considered that the state of necessity is a ground for precluding the wrongfulness of an act not in conformity with an international obligation. Unlike other statements made by the Court on this topic, the observation quoted above was not made with limited reference to States as subjects of international law. On that basis, one could use the quoted observation to lend support to the proposition that necessity might preclude the wrongfulness of acts of international organizations. Another of the Court's propositions on this point, i.e., that such a preclusion can only be accepted on an exceptional basis, might also be applied to international organizations using the same reasoning.

However, when applying this principle to international organizations, principles of State responsibility begin to lose relevance. Turning to the circumstances under which necessity might be invoked, the Court was more specific in its discussion, explicitly referring to an "essential interest" of the State which is the author of the act and to the fact that the State must not have contributed to the condition of necessity.[69] It is unclear whether international organizations could claim "essential interests" similar to those of States, in order to invoke the defence of necessity. This begs the question whether the circumstances under which a State might invoke necessity are relevant to the circumstances under which an international organization might invoke necessity to preclude the wrongfulness of an act, assuming an international organization can invoke necessity to preclude the wrongfulness of an act.

United Nations Secretariat

The closest analogy to the notion of "necessity" invoked by States in circumstances of article 25 of the draft articles on responsibility of States for internationally wrongful acts, is "operational necessity" in the context of peacekeeping operations. An analysis of the concept of "operational necessity" as an exemption of the Organization from liability for property loss or damage caused by United Nations forces in the ordinary operation of the force, and the conditions for invoking it, are contained in the report of the Secretary-General (A/51/389, paras. 13-15).

World Intellectual Property Organization

As pointed out, article 25 of the International Law Commission's draft on responsibility of States for internationally wrongful acts refers to "necessity", which may be invoked by a State under certain conditions. To the extent that international organizations are a mere conglomeration of States (and, sometimes, other entities), we see no reason why those organizations should not also be able to invoke

[68] *Gabcikovo-Nagymaros Project (Hungary/Slovakia)*, I.C.J. Reports 1997, p. 40.

[69] Ibid., pp. 40-41.

necessity as regards certain of their actions. This invocation of necessity by an international organization would, in any event, presumably be done in the name of the constituent States members of the organization. The inbuilt mechanisms of accountability by the international organization to its member States should also serve to prevent or check abuse by the international organization when it seeks to invoke necessity.

N. Request or authorization of the conduct of a State by an international organization

European Commission

In response to this question, we would like to refer back to our general view, explained above, that such situations warrant adequate treatment already at the level of attribution of conduct (and not only at the level of attribution of responsibility).

International Criminal Police Organization

It would seem that an organization's responsibility for the conduct a member adopts in compliance with a request of the organization or authorized by it will depend of the nature of the relationship between the organization and its members. True, the very fact of membership in an international organization entails certain mutual cooperation and good faith on the part of both the member and the organization.[70] However, this does not necessarily rise to the level that an organization must be held responsible for actions members undertake in compliance with a request of the organization or authorized by it. Under the ICPO-Interpol Constitution, the body of mutual cooperation and good faith is subject to the limits of the laws existing in the different countries (article 2, paragraph 1) and the compatibility of the actions of members with the legislations of their countries (article 31). The terms "laws existing in the different countries" and "the legislations of their countries" are deemed to comprehend the international obligations incumbent upon them.

Hence, whether stated or not in each case, all requests for cooperation with ICPO-Interpol in the search for a wanted person, a missing person, or any other type of police cooperation, which is inherent to ICPO-Interpol transmittals of requests by its members, is always conditioned by the aforementioned provisions of the Constitution.

The European Court of Human Rights' judgement in Öcalan v. Turkey[71] may be called upon to illustrate the effects of the condition in the ICPO-Interpol Constitution that countries should cooperate within the limits of their national laws. Öcalan, who was the subject of an Interpol Red Notice, was prosecuted in Turkey after he was detained in Kenya pursuant to that Red Notice and handed over to Turkish law enforcement authorities at Nairobi airport. In his complaint before the European Court of Human Rights, the applicant maintained that he had been abducted by the Turkish authorities operating overseas, beyond their jurisdiction, and that it was for the Government to prove that the arrest was not unlawful. In his

[70] *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, advisory opinion*, I.C.J. Reports 1980, p. 93, para. 43.

[71] *Öcalan v. Turkey* (Application No. 46221/99), Judgement of 12 March 2003.

view, the fact that arrest warrants had been issued by the Turkish authorities and a Red Notice circulated by ICPO-Interpol did not give officials of the Turkish State jurisdiction to operate overseas. He submitted that the arrest procedures that had been followed did not comply with Kenyan law or the rules established by international law, that his arrest amounted to abduction and that his detention and trial, which were based on that unlawful arrest, had to be regarded as null and void. The Turkish Government affirmed that its responsibility was not engaged by the applicant's arrest abroad and that the cooperation between Turkey and Kenya had led to Mr. Öcalan's arrest. Therefore, according to the Government, Öcalan had been brought before a Turkish judicial authority at the end of a lawful procedure, in conformity with customary international law and as part of the strategy of cooperation between sovereign States in the prevention of terrorism.

The Court accepted that an arrest made by the authorities of one country on the territory of another country, without the consent of the latter, affects the person's individual rights to security under the European Convention. As regards extradition arrangements between countries when one is a party to the European Convention and the other is not, the Court considered that the rules established by an extradition treaty or, in the absence of any such treaty, the cooperation between the countries concerned are also relevant factors to be taken into account for determining whether the arrest that has led to the subsequent complaint to the Court was lawful. The fact that a fugitive has been handed over as a result of cooperation between countries did not in itself make the arrest unlawful or, therefore, give rise to any problem under the European Convention. The Court reiterated that inherent in the whole of the European Convention is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. As movement about the world becomes easier and crime takes on a larger international dimension, it is increasingly in the interest of all nations that suspected offenders who flee abroad should be brought to justice. Conversely, the establishment of safe havens for fugitives would not only result in danger for the State obliged to harbour the protected person but would also tend to undermine the foundations of extradition. It considered that, subject to its being the result of cooperation between the countries concerned and provided that the legal basis for the order for the fugitive's arrest is an arrest warrant issued by the authorities of the fugitive's State of origin, even an extradition in disguise cannot as such be regarded as being contrary to the Convention.

The Court further held that, independently of the question whether the arrest amounts to a violation of the law of the country in which the fugitive has taken refuge — a question only examined by the Court if the host State is a party to the European Convention — it must be established to the Court beyond all reasonable doubt that the authorities of the country to which the applicant has been transferred have acted extraterritorially in a manner that is inconsistent with the sovereignty of the host State and therefore contrary to international law. As regards the question whether the arrest was in violation of Kenya's sovereignty, the Court noted that the Kenyan authorities did not perceive the applicant's arrest by the Turkish officials in an aircraft at Nairobi Airport as being in any way a violation of Kenyan sovereignty. It did not lead to any international dispute between Kenya and Turkey or to any deterioration in their diplomatic relations. The Kenyan authorities did not make any protest against the Turkish Government on this point or claim any redress from Turkey, such as the applicant's return or compensation.

These aspects of the case led the Court to accept the Government's version of events: it considered that at the material time the Kenyan authorities had decided either to hand the applicant over to the Turkish authorities or to facilitate such a handover. In the light of these considerations and in the absence of any extradition treaty between Turkey and Kenya laying down a formal procedure to be followed, the Court held that it has not been established beyond all reasonable doubt that the operation carried out in the instant case partly by Turkish officials and partly by Kenyan officials amounted to a violation by Turkey of Kenyan sovereignty and, consequently, of international law.

It can be inferred from the way the European Court of Human Rights handled the above case that the fact a person is apprehended and brought to justice based on cooperation within ICPO-Interpol does not convert the actions of the countries concerned into action that should engage the responsibility of the organization.

International Monetary Fund

In responding to this set of questions, one must first validate the assumptions that underlie the questions asked.

First, it is important to note that when a member State acts in compliance with a request on the part of an international organization and the conduct subsequently results in a breach of an international obligation of that State, the international organization may not have requested the member State to breach its international obligations, but merely to carry out a certain activity. Thereafter, absent direction or control by the organization, the State alone is responsible for the manner in which it chooses to carry out, or not, the organization's request.

For example, the International Monetary Fund (IMF) may, in response to a member's request for use of IMF resources, indicate, in accordance with the Articles of Agreement, that for the member to use the IMF resources, the member needs to reduce the net present value of its sovereign debt. The member might decline to do so, or it might do this in a variety of ways, e.g., by refinancing the debt with new concessional debt, by negotiating debt write-offs or reductions in debt with its creditors, etc. However, the member may also reduce its debt burden by unilaterally defaulting on its debt, thereby breaching the member's international financial obligations. Here, IMF has neither requested the member to breach its international obligations, nor exercised any direction or control over the means used by the member to carry out the act, which constituted the internationally wrongful act. Indeed, the IMF policy is to encourage a member to adhere to its contractual obligations to the extent possible. It never encourages a member to default. Rather, it encourages a member to approach its creditors in a collaborative manner to seek a restructuring of claims in a manner that avoids defaults. Therefore, the specification of a certain objective by an international organization, which the member decides to achieve by breaching one of its international obligations, cannot result in international responsibility of the organization.

Second, the question asked contemplates a situation where the conduct requested gives rise to a breach of an international obligation of both the State in question and the international organization requesting the conduct. It is important to note that States and international organizations seldom have identical or even similar obligations. It is difficult to envisage a situation where conduct by a State could give rise to the breach of an international obligation of the international

organization. Specific examples of the situation(s) envisaged by the Commission in drafting this query would facilitate our responding to this element of the question.

Third, when conduct is "authorized" by an international organization, the fact that the organization can "authorize" the conduct necessarily implies that, once authorized, the conduct is not a violation of the organization's charter. For example, article VIII, section 2 (a), of the IMF Articles of Agreement allows IMF to approve exchange restrictions imposed by members on the making of payments and transfers for current international transactions. If IMF were to authorize the imposition of an exchange restriction by a member pursuant to this provision, IMF would have acted in accordance with its Articles, and the imposition of said exchange restriction could not be regarded as a breach of that member's obligations under the IMF Articles. Therefore, it is difficult to envisage a situation where the granting of an authorization could be regarded as wrongful in international law.

United Nations Secretariat

As for the third question raised by the Commission, we are not aware of any situation where the Organization was held jointly or residually responsible for an unlawful act by a State in the conduct of an activity or operation carried out at the request of the Organization or under its authorization. In the practice of the Organization, however, a measure of accountability was nonetheless introduced in the relationship between the Security Council and Member States conducting an operation under Security Council authorization, in the form of periodic reports to the Council on the conduct of the operation. While the submission of these reports provides the Council with an important "oversight tool", the Council itself or the United Nations as a whole cannot be held responsible for an unlawful act by the State conducting the operation, for the ultimate test of responsibility remains "effective command and control".

World Intellectual Property Organization

We are of the view that in the event a certain conduct, in which a member State engages in compliance with a request on the part of an international organization, appears to be in breach of an international obligation both of that State and of that organization, then the organization should also be regarded as responsible under international law. The degree of responsibility of the organization should be much lower if the State's wrongful conduct was only authorized, but not requested, by the organization.

O. Practice relating to responsibility of international organizations

Germany

Germany is a member of numerous international organizations. The question of "responsibility of international organizations" presupposes the possession of an international legal personality separate and distinct from that of the States creating it. The existence, constitution, status, membership and representation of an international organization is governed by international law. To a certain degree it is attributed an autonomy in order to fulfil its tasks and to exclude influence from the outside. It is usually also given privileges and immunity to ensure its autonomy. If the responsibility of an international organization is not governed by its statute or

treaty law, a minimum standard of responsibility can be derived from customary international law and from human rights standards as well as generally accepted standards contained in widely ratified treaties.[72]

There has been relatively little German State practice relating to the responsibility of international organizations. Germany's comments on State practice in this field are thus based on relevant judicial rulings and federal Government statements.

The division of responsibility between Germany as a member of various international organizations and the international organizations themselves is in principle governed by the pertinent international agreements concluded between Germany and each organization. However, only a few of these agreements include express provisions on responsibility. And these do not provide for a standardized solution on the issue of responsibility.

In Germany's opinion there is no customary international law on the responsibility of international organizations.

Practice to date shows that in a majority of cases, Germany has presumed that the responsibility of member States and that of international organizations is separate. Indirect responsibility of member States was only considered in exceptional cases.

The following comments are divided into three parts:

(a) Attribution of responsibility in international treaties;

(b) Attribution of responsibility in the jurisprudence of national and international courts;

(c) Final observations.

I. Attribution of responsibility in international treaties

Germany is party to a number of international agreements that provide for a division of responsibility between an international organization and its member States. Such agreements include in particular constituent agreements, headquarters agreements and status of forces/mission agreements. In principle these treaties — with a few exceptions — envisage such a distinction.

A. Constituent agreements of international organizations

The constituent agreements of some international organizations include express provisions on the responsibility of the member States for the obligations of the organization. These are primarily organizations such as international development banks and commodity organizations whose principal activities involve independent economic operations or the assumption of obligations, that is, activities which inherently expose them to liability.

[72] See also resolution No. 1/2004 on the accountability of international organizations, referring to the Final Report of the 71st Conference of the International Law Association, held in Berlin, 16-21 August 2004, www.ila-hq.org.

1. International development banks

The charters of the international banks of which Germany is a member commonly limit the liability of the member States and shareholders to the value of their paid-in and payable shares. Clauses of this kind are found, for example, in the Articles of Agreement of the World Bank (article II, section 6), the Bank for International Settlements (article 11), the European Bank for Reconstruction and Development (article 5 (7), first sentence, cf. also article 17), the European Investment Bank (article 4 (1)), the African Development Bank (article 6 (5)), the Asian Development Bank (article 5 (6)) and the Multilateral Investment Guarantee Agency (article 8 (d)).

Some constituent agreements include equivalent clauses that explicitly stipulate that member States shall not be held liable, by reason of their membership, for obligations of the organization. Such provisions are found, for example, in the Articles of Agreement of the International Development Association (article II, section 3)[73] and the International Finance Corporation (article II, section 4),[74] both World Bank subsidiaries, and the African Development Fund (article 10), the Asian Development Bank (article 5 (7)), the International Fund for Agricultural Development (article 3 (3))[75] and the European Bank for Reconstruction and Development (article 5 (7), second sentence).

All of these agreements provide that should a State cease to be a member, it shall remain liable for its direct obligations to the bank, but shall cease to incur liabilities with respect to obligations entered into thereafter by the bank. The same applies in the event that the organization is wound up.

All in all, the constituent agreements of the international development banks thus follow the model of limiting the liability of member States to their subscription. No further joint and several liability or secondary liability on the part of the member States is envisaged.

2. International commodity organizations

Some of the commodity organizations[76] of which Germany is a member also have express provisions on liability. Such provisions are of special importance when the commodity organization maintains a buffer stock to help regulate prices. The most famous example of this kind, the agreement on the International Tin Council,[77] did not, however, contain any provisions on the member States' liability for obligations entered into to finance the buffer stock. An unambiguous obligation to provide extra funds was included solely with respect to the Tin Council's administrative expenses. When the Tin Council suspended activities in 1985 because of excess debts, the liability of the member States thus had to be determined by the courts.

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[73] United Nations, *Treaty Series*, vol. 439, No. 6333.

[74] United Nations, *Treaty Series*, vol. 264, No. 3791.

[75] 15 ILM 922 [1976].

[76] Liability is not mentioned in the International Wheat Agreement of 1971 or in the International Sugar Agreement of 1984.

[77] Sixth International Tin Agreement of 26 June 1981, Federal Law Gazette 1984 II 15. The Tin Council was dissolved in 1990.

In contrast, the International Cocoa Agreement expressly excludes members' liability for obligations to finance the buffer stock.[78] The International Natural Rubber Agreement of 1995[79] limits the liability of member States to the extent of their obligations regarding contributions to the administrative budget and to financing the buffer stock.[80] These contributions are in turn limited ab initio by the fixed maximum size of the buffer stock; the borrowing of monies to finance the buffer stock is not envisaged, in contrast to the situation under the previous Agreement of 1979.[81] The resulting limitation of liability is also likely to apply in the event of the liquidation of the buffer stock,[82] although this is not entirely clear from the provisions.

The constituent agreements of the international commodity organizations that do not maintain buffer stocks contain no more than rudimentary provisions on liability. Such clauses can be found in the International Agreements on Tropical Timber, Olive Oil, Coffee and Jute. All these agreements expressly exclude liability by reason of membership above and beyond the normal liability to pay contributions.[83]

A special case is presented by the Common Fund for Commodities, which is designed to finance measures of the individual commodity organizations. Insofar as they are also members of the Fund, the member States of the relevant commodity organizations provide the Fund with a certain guarantee capital to cover their liability for the obligations of their commodity organization.[84] The liability in question is a pro rata liability. The member States are thus liable for the debts of their commodity organization to the Fund, but not without limit and only secondarily. The guarantee capital is also subject to call by the Fund to cover its own obligations in certain circumstances. Liability of the member States by reason of their membership as such is expressly excluded.[85]

Some of the commodity organizations thus provide for liability for certain obligations on the part of the member States, but only to a limited extent that is defined in advance. Apart from such express exceptions, the commodity agreements presume that there is a division of responsibility between States and organizations.

3. *European Community treaty*[86]

A distinction must be drawn between the above agreements and the attribution of responsibility within the European Union. The European Community treaty contains no express provisions on the liability of the member States for obligations

[78] Article 24 of the International Cocoa Agreement, 2001.

[79] Federal Law Gazette (Bundesgesetzblatt — BGBl.) 1996 II 1248 ff.

[80] Article 48 (4) of the Agreement.

[81] Federal Law Gazette 1981 II 462.

[82] Article 40 (2) (d) of the International Natural Rubber Agreement.

[83] Article 20 (8) of the International Tropical Timber Agreement; article 50 of the International Olive Oil Agreement; article 16 (1), fifth sentence, of the International Coffee Agreement of 2001; para. 15 of the Agreement Establishing the Terms of Reference of the International Jute Study Group of 2001, as well as Article 22 (7) of the (now expired) International Jute Agreement of 1989.

[84] Article 14 (4) of the Agreement Establishing the Common Fund for Commodities.

[85] Article 6 of the Agreement Establishing the Common Fund for Commodities.

[86] Treaty Establishing the European Community.

of the Community, but states in article 300 (7)[87] that agreements concluded by the European Community shall be binding not only on the institutions of the Community but also on member States. The meaning of this provision is, however, disputed. It is interpreted by some as saying that international treaties are directly binding as between the States members of the European Community and the relevant contracting parties.

However, in the opinion of the federal Government, article 300 (7) is a purely internal provision. Understood as such, the article solely forms a basis for obligations under community law vis-à-vis the European Community and does not permit third parties to assert direct claims against the States members of the European Community. Accordingly, no liability for breaches of treaty by the European Community can be construed from article 300 (7) when thus interpreted, but only the internal obligation within the European Community to contribute to the fulfilment of treaties and to finance through the budgetary procedure any obligation to pay damages.

4. *Other constituent agreements*

The constituent treaties of some other international organizations also include provisions on the attribution of responsibility to the organization and to its member States. Some international research institutions which are partly funded by Germany provide for the pro rata liability of member States for the obligations of the organization in the event of its liquidation. This is true for example of the European Organization for Nuclear Research (CERN),[88] the European Centre for Medium-range Weather Forecasts,[89] the European Molecular Biology Laboratory and the 1975 Convention for the Establishment of a European Space Agency.[90]

In some other cases member States are liable for the obligations of the organization, but expressly only vis-à-vis the organization itself, that is, not to external creditors. Liability is regulated in this way for the European Patent Office[91] and the International Telecommunications Satellite Organization (INTELSAT), and is limited on a pro rata basis for the latter organization. Here, too, it can thus be presumed that basically there is a division of responsibility, which is only departed from in expressly specified cases.

The Convention for the establishment of a European Organisation for the Exploitation of Meteorological Satellites (EUMETSAT), which regulates liability in article 9, operates on similar assumptions. Relevant for our purposes is article 9 (2), which excludes the liability of the member States and EUMETSAT to each other with respect to specific errors in operating the organization's satellite system.[92]

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[87] Originally article 228 (2); included in the Constitutional Treaty of June 2004 without amendment as article III-225 (2).

[88] Article XIV of the Convention for the Establishment of a European Organization for Nuclear Research.

[89] Article 21 (3) of the Convention establishing the European Centre for Medium-range Weather Forecasts.

[90] Convention for the Establishment of a European Space Agency, article XXV (3), Federal Law Gazette 1976 II 1862 ff.

[91] Article 40 (2) of the European Patent Convention.

[92] Federal Law Gazette 1987 11257 ff., plus amendment in Federal Law Gazette 1994 II 1037 ff.

B. Headquarters agreements with international organizations

Pursuant to the principle of territoriality, a host State could potentially be held liable for the actions of the hosted organization (most of which occur or were at least decided upon on this territory). However, headquarters agreements in general focus on status issues and thus indicate indirectly that international organizations can themselves be held liable for their actions. Provisions on the responsibility of host States are very rare. Where they do exist, they tend explicitly to exclude the liability of the host State as such — as for example in the 1957 Headquarters Agreement between the International Atomic Energy Agency and Austria,[93] the Headquarters Agreement between the United Nations and Austria regarding the United Nations Industrial Development Organization (1967)[94] and the Headquarters Agreement between Switzerland and the International Labour Organization (1946).[95]

The headquarters agreements that Germany has concluded with international organizations rarely contain provisions on the topic now under consideration. The Agreement between the Federal Republic of Germany and the United Nations concerning the Headquarters of the United Nations Volunteers Programme,[96] for example, which serves as a model agreement for the other headquarters agreements with the United Nations and related international institutions, does not govern liability at all, but concentrates primarily on privileges and immunities. The Headquarters Agreement between Germany and EUMETSAT[97] makes the organization liable for damage arising from its activities in the Federal Republic of Germany (see article 4). However, it refers only to liability under German law and does not mention Germany's liability as host State; this provision could at best be read as implicitly excluding Germany's liability. On the other hand, some conference agreements between the federal Government and the United Nations contain a far-reaching exemption from liability for the United Nations for damage or other claims arising during the conference. Germany accepted the main thrust of this clause in connection with a United Nations workshop in Bremen University in September 2003 and another workshop in Munich in 2004 for purely political reasons.[98]

C. Status of forces and status of mission agreements

Status of forces and status of mission agreements contain case-specific provisions on liability. General statements on the division of responsibility are hard to make. In Germany's view, the status of forces agreements concluded within the framework of the United Nations, the North Atlantic Treaty Organization (NATO) and the European Union are particularly relevant for the present topic.

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[93] United Nations, *Treaty Series*, vol. 339, No. 4849, article XVIII (46).

[94] United Nations, *Treaty Series*, vol. 600, No. 8679, article XV (36). This Headquarters Agreement was replaced in 1995 by a new Headquarters Agreement between Austria and UNIDO itself.

[95] United Nations, *Treaty Series*, vol. 15, No. 103, article 24.

[96] Federal Law Gazette 1996 II 905 ff.

[97] Federal Law Gazette 2003 II 489 ff.

[98] Arrangement for the Workshop on Education and Capacity-building in Space Technology for the Benefit of Developing Countries, sect. D, para. 3.

One such standing agreement is the NATO Status of Forces Agreement, which (only) applies between the States members of NATO.[99] It governs, inter alia, liability for damage caused by troops stationed abroad. Under article VIII (1), the member States have waived all their claims against the other members for damage to property. In the case of damage to third parties, especially private persons, article VIII (5) of the NATO Status of Forces Agreement[100] provides for a distribution of costs between the receiving State and the relevant sending State. No liability is envisaged on the part of NATO. The sending and receiving States shall be held responsible. This rule has been extended to the status of NATO headquarters included by means of a separate protocol.[101] Only if it cannot be determined whose armed services caused the damage are all the member States concerned held equally liable.[102] It must be noted that these provisions are not based on the idea that liability arises out of NATO membership. Rather, the sending State is held responsible for the actions of its own armed services. The joint liability of the receiving State is based on its contributory responsibility for allowing allied troops to use its territory and because of the benefit it reaps in security policy terms from their presence and activities. The joint liability of all States concerned when the originator of the damage cannot be confidently identified is to be considered the result of their possible albeit unproven responsibility for activities that may have been entirely theirs. There is no presumption that the international organization as such bears responsibility.

The same is true of the European Union Status of Forces Agreement, which was signed on 17 November 2003 and should enter into force early in 2005.[103] Article 18 thereof contains a waiver of all claims by the member States against each other and provides for the distribution of costs incurred in satisfying third party claims between the sending and receiving States. A supplementary agreement is intended to extend this waiver to all damage that occurs outside the territory of the States members of the European Union.[104] In both cases there is no provision for the liability of the European Union itself.

The Council decision on the Athena financing mechanism contains further provisions on liability that relate specifically to European Union military operations abroad.[105] Athena itself has legal capacity, so that article 40 (2) and (3) of the decision can directly assign contractual and non-contractual liability to this

[99] Federal Law Gazette 1961 II 1190 ff. This is supplemented for Germany by the Agreement of 3 August 1959 to Supplement the NATO Status of Forces Agreement, Federal Law Gazette 1961 II 1183.

[100] Supplemented for Germany by article 41 of the Agreement to Supplement the NATO Status of Forces Agreement and the Domestic Implementing Act, Federal Law Gazette 1961 II 1183 ff.

[101] Protocol on the Status of International Military Headquarters set up pursuant to the North Atlantic Treaty, especially article 6 thereof, Federal Law Gazette 1969 II 2000 ff.; Agreement between the Federal Republic of Germany and the Supreme Headquarters Allied Powers Europe, article 22, ibid., p. 2009 ff.

[102] Article VIII (5) (e) (ii) and (iii) of the NATO Status of Forces Agreement.

[103] OJ 2003 C 321/6 ff.

[104] Council document 7479/04 of 6 April 2004.

[105] Council decision 2004/197/CFSP of 23 February 2004, OJ L 63/68 establishing a mechanism to administer the financing of the common costs of European Union operations having military or defence implications. This separate financing mechanism serves the financing of European Union military operations, since the European Community budget is not available for such operations.

financing mechanism. The phrase "shall be covered through Athena by the contributing States" means that Athena is liable to third parties and that the contributing States may only be proceeded against within the financing mechanism through their contributions to it.[106] One could thus talk of joint liability. However, this sharing of costs for non-contractual liability is limited to damage caused by the common European Union command structures, that is, by the integrated headquarters and its staff. Liability for damage caused by the forces provided by the member States is not mentioned in the decision and so remains the responsibility of each sending State. The liability of the European Union and its member States to other contributing States is explicitly excluded.

In addition to these standing status of forces agreements, account should also be taken of the specific status of forces agreements concluded with the third state on whose territory an operation is to take place. The relevant agreement between the European Union and Macedonia concluded on 21 March 2003 for operation Concordia governed liability for damage arising in connection with the operation in article 13.[107] This provision did not, however, specify the party against which such claims can be brought and so provided no indication of how liability is distributed between the troop-contributing States and the European Union financing mechanism. The distribution of liability was only regulated with the conclusion of the relevant arrangements with the sending States, which provided in principle for the liability of the sending State.[108] This was only to be derogated from should the financing mechanism established for the operation decide to make good the damage; this in turn was only provided for in the case of damage caused by the European Union joint command structures[109] — that is, as is now provided for under the Athena mechanism.[110]

The United Nations model Status of Forces Agreement, which underlies the status of forces agreements concluded between the United Nations and the various host countries for peacekeeping operations[111] is silent as to the distribution of responsibility.

D. Other agreements

A few multilateral agreements touch on the issue of attribution of responsibility in the event of a breach of treaty by an international organization. As early as 1962, the Brussels Convention on the Liability of Operators of Nuclear Ships[112] considered the matter. The committee charged with resolving this problem proposed that international organizations should be allowed to accede to the Convention, provided their member States promised the organization that they would (part-)finance its obligations. This proposal was not, however, incorporated into the Convention.

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[106] "Contributing States" means all States contributing to the financing of any specific operation.

[107] OJ 2003 L 82/45 ff.

[108] See, for example, the agreement with Turkey of 26 May 2003, OJ L 234/22 ff., article 6 (2).

[109] Specimen Council decision establishing an operational financing mechanism, Council document 5491/1/03 of 21 January 2003, article 9 (3).

[110] See supra for comments on Athena.

[111] See A/45/594.

[112] AJIL 268 (1963).

An example for responsibility by virtue of membership of an organization is to be found in the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies (Outer Space Treaty) of 10 October 1967,[113] which has been ratified by Germany. The third sentence of article VI thereof stipulates that both international organizations and their member States bear responsibility for ensuring compliance with the Outer Space Treaty; article VII states that each country from whose territory an object is launched into outer space is internationally liable for damage caused by that object. The Outer Space Treaty is thus one of the very few instruments that provides for responsibility by reason of membership of an organization. The Convention on International Liability for Damage Caused by Space Objects of 29 March 1972[114] (Liability Convention) likewise provides for the joint and several liability of the member States should an international organization bear responsibility for damage.[115] However, the claim must first be asserted against the organization. Only if it fails to make good the damage may the plaintiff proceed against the member States. By acceding to the Liability Convention, the member States of an organization thus basically act as its guarantors.

Finally, article 139 (2) of the United Nations Convention on the Law of the Sea of 1982[116] envisages that States and international organizations are in principle to be held separately liable for breaches of their treaty obligations. Only when States and international organizations act together do they bear joint and several liability.

It is moreover possible for member States to assume liability by means of a specific agreement among themselves or with the creditor to that effect. This was the case with respect to the liquidation of Eurochemic, an international company founded under the auspices of the Organization for Economic Cooperation and Development. Upon its liquidation, the member States agreed to make available funds beyond the business capital in order to meet existing obligations, in return for which Belgium declared itself willing to assume responsibility for taking over and decommissioning the plants and disposing of the radioactive waste.

II. Attribution of responsibility in the jurisprudence of national and international courts

There are only a few known cases in which the courts have had to take a stance on the attribution of responsibility. Below follows a survey of German and international jurisprudence on the subject. The list is by no means comprehensive; the selection is limited to cases that are of direct relevance to Germany.

A. International Tin Council

The classic case for the issue of member State liability for the actions of international organizations is the insolvency of the International Tin Council in October 1985. The unfulfilled private law obligations of the Council stemming from its borrowing and subsequent forward transactions led to a series of cases against the Council, primarily before the English courts. One case was, however, also heard by the European Court of Justice.[117] In his final submissions, Advocate General

[113] Federal Law Gazette 1969 II 1968.
[114] Federal Law Gazette 1975 II 1210.
[115] Article XXII (3) of the Liability Convention.
[116] Federal Law Gazette 1994 II 1799.
[117] C-241/87 Maclaine Watson Co. Ltd. v. Council and Commission.

Darmon presumed that a separation of liability was to be derived from the Council's international legal personality.[118] The fact that the European Community and its member States together formed a blocking minority in the Council in no way altered this conclusion. In addition, he submitted, the European Court of Justice was not competent to review actions of the Council. The European Court of Justice was never called upon to rule in this case, since the proceedings were discontinued on 10 May 1990 after the parties had reached an amicable agreement.

B. Responsibility of member States of international organizations under human rights instruments

The jurisprudence of the Strasbourg Court and Commission of Human Rights, which are responsible for upholding the European Convention for the Protection of Human Rights and Fundamental Freedoms, is of considerable significance for our topic with regard to the activities of international organizations. International organizations, in particular the European Community, are not parties to the Convention and thus are not subject to the jurisdiction of its judicial organs. The question thus arises whether European Convention States (at least) bear responsibility for any infringements of the standards set by the Convention by the international organizations they have established and whether they can be sued for such infringements before the Strasbourg organs.

The European Commission of Human Rights has rejected the liability of the host State, for example in X. v. Germany[119] and X. v. Sweden/Germany.[120] Both cases concerned the responsibility of the host State for rulings of an international court. The European Commission of Human Rights initially also rejected the idea of liability by reason of membership. In its Confédération française démocratique du travail decision[121] of 10 July 1978, the Commission rejected the claims brought against the member States of the European Coal and Steel Community (ECSC) by a French trade union aggrieved at not being considered for a position on the ECSC Consultative Committee, on the grounds that the participation of the States in ECSC organs did not constitute an exercise of sovereign powers within the meaning of article 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

The European Commission of Human Rights and later the European Court of Human Rights have, however, declined to adhere strictly to this early line. In the Melchers decision[122] of 9 February 1990, the European Commission of Human Rights dealt with a case in which the European Court of Justice had on the whole upheld a fine imposed by the European Community Commission for breach of competition rules and for which the German courts had issued a writ of execution pursuant to article 192 (2) TEC (now art. 256 (2) TEC). The federal Government argued that Germany bore no liability on the grounds that the acts involved were acts of the European Community:

> "The respondent Government argues that the Federal Republic of Germany is not responsible under the Convention for acts and decisions of the European

[118] Final submissions, para. 131 ff.
[119] 1958 Yearbook of ECHR 256.
[120] 1965 Yearbook of ECHR 272.
[121] C-8030/77, Decisions and Reports (DR) 13, p. 231.
[122] *M. & Co. v. Germany*, C-13258/87, DR 64 p. 138.

> Communities. The Federal Minister of Justice, in granting a writ of execution for a judgment of the European Court of Justice, did not have to examine whether the judgement in question had been reached in proceedings compatible with fundamental rights guaranteed by the European Convention on Human Rights or the German Basic Law. He only had to examine whether the judgement was authentic. Therefore, he had to determine neither a civil right nor a criminal charge within the meaning of article 6 of the Convention. Furthermore, the Federal Republic's responsibility under the Convention could not be derived from the fact that it transferred part of its powers to the European Communities. Otherwise, all Community acts would indirectly be subject to control by the Convention organs. However, such a result would not be compatible with the generally accepted principle that the Convention did apply to the European Communities and would become binding for them only if they formally adhered to it. In this context the respondent Government also points out that, in any event, observance of fundamental rights is secured by the European Court of Justice. Even if it should be found that national authorities, nevertheless, also remained bound to control Community acts such as manifest and flagrant violations of fundamental rights, such control had, in the present case, been effected by the German civil courts, which had found no appearance of such a violation.[123]

The European Commission of Human Rights dismissed the complaint as inadmissible. It decided that the transfer of sovereign powers to international organizations was not prohibited by the European Convention for the Protection of Human Rights and Fundamental Freedoms. However, it was of the opinion that such a transfer could not release the member States from their responsibility to ensure observance of the Convention. The test is thus whether fundamental rights are sufficiently protected within the international organization.

Germany expressly rejected responsibility for acts of the European Community in its submissions to the Commission.[124]

The doctrine of equivalent protection was reaffirmed by the European Court of Human Rights in its parallel judgments in Waite and Kennedy v. Germany and Beer and Regan v. Germany of 18 February 1999.[125] In these cases workers hired out to the European Space Agency (ESA) in Darmstadt sued ESA, arguing that they had acquired the status of ESA employees. The German labour courts declared the actions inadmissible because ESA enjoyed immunity from jurisdiction as an international organization. The plaintiffs proceeded to challenge this ruling in Strasbourg. The complaint in Strasbourg did not, however, relate to the actions of ESA, but to the refusal of the German courts to review those actions. The European Court of Human Rights thus did not need to address directly the question of whether Germany could be held responsible for the actions of ESA. The federal Government made the following submission:

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[123] Ibid., p. 144.

[124] Ibid., p. 144.

[125] Waite and Kennedy v. Germany, C-26083/94; see, in particular, para. 67 ff., Beer and Regan v. Germany, C-28934/95, see, in particular, para. 57 ff. Similarly, the judgement in Prince Hans-Adam II of Liechtenstein v. Germany of 12 July 2001, C-42527/98, para. 48, which did not involve an international organization but the exclusion of German legal remedies by an international treaty.

> "The respondent Government observes that the German courts granted the European Space Agency immunity from the applicant's action in accordance with the relevant provisions of the German Courts Organisation Act. Referring to the case law of the Convention organs, they maintain that the right of access to court is subject to inherent limitations which include the traditional and generally recognized principle of parliamentary and diplomatic immunity and also the immunity of international organizations. In this respect, they explain that the immunity granted to international organizations corresponds, like State immunity, to the principle of the sovereign equality of all States. An international organization can only function satisfactorily if its independence is ensured. The activities of international organizations are so closely linked with their sovereign purposes that even private acts cannot be entirely excluded from immunity. Moreover, the Government considers that sufficient legal protection is provided for the applicants in that they could have brought an action against the Irish company, CDP, the other party to their contracts, claiming compensation under S. 10 para. 2 of the German Provision of Labour Act. The question of whether they acted in good faith would have had to be clarified in the said court proceedings."[126]

Although this case did not primarily concern the question of responsibility, the European Court of Human Rights reiterated the view that establishing an international organization did not release parties to the Human Rights Convention from the obligations assumed thereunder. It thus presumed that Germany remained in principle responsible for safeguarding the right to a fair trial under article 6 (1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms even where actions of the European Space Agency were involved. In the final analysis, it did not, however, consider the recognition of ESA immunity to constitute a violation of article 6 (1), because the ESA Convention itself provided adequate alternative legal remedies against ESA acts. This is ultimately in line with the test formulated in M. & Co. under which fundamental rights must receive an equivalent protection when sovereign powers are transferred to an international organization.

Nonetheless, the scope and precise meaning of the M. & Co. doctrine of equivalent protection are still not entirely clear.

It was hoped that the decision in Senator Lines GmbH v. Austria and others of 30 March 2004 would clarify the issue.[127] As a State member of the European Union, Germany, too, was among the respondents. The facts of the case were as follows: the shipping company Senator Lines had been fined by the European Union Commission for infringements of European Community competition rules. Senator Lines challenged the decision before the Court of First Instance and requested a dispensation from the requirement to provide a bank guarantee. The request was refused by the Court of First Instance and thereafter by the European Court of Justice. Senator Lines thereupon applied to the European Court of Human Rights on the grounds that its fundamental rights to a fair trial under article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, in particular the presumption of innocence, had been infringed. The application was directed against the States members of the European Union. The respondents

[126] *Waite and Kennedy* v. Germany, C-26803/94, para. 67 ff.

[127] Senator Lines GmbH v. Austria and others, C-56672/00.

seemed to presume a separation of responsibility exists. In their joint submissions the European Union States argued as follows:

> "The Governments' principal contention was that the complaints did not relate to sovereign acts by any of the individual respondent States, such that the acts complained of did not represent an exercise by the individual States of their jurisdiction within the meaning of article 1 of the Convention. They referred to the case law of the European Commission of Human Rights to the effect that an application cannot be made against the European Communities as such, or against the member States jointly and/or severally (CFDT v. the European Communities and their member States, application No. 8030/77, Commission decision of 10 July 1978, Decisions and Reports (DR) 13, p. 231). They saw no contradiction between this position and the case law of the Court in which States have been held liable for acts which they performed in pursuance of international obligations or in the context of international obligations (the aforementioned Matthews v. the United Kingdom judgement), and pointed out that the European Community has legal personality, and neither it nor its organs in any way represents its member States.
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> "In the alternative, the respondent States submitted that the Community's legal order in any event ensures respect for human rights. Consequently, the principle of subsidiarity should exclude a review by the Court of the acts at issue. They referred in this respect to the case of M. & Co. v. Germany (application No. 13258/87, Commission decision of 9 February 1990, DR 64, p. 138), in which the Commission accepted that it was permissible for States to transfer powers to international organizations provided that, within the organization, fundamental rights receive an equivalent protection. The Commission found that the European Communities, through declarations and the existing case law of the European Court of Justice, secured fundamental rights and provided for control of their observance. The respondent States pointed out that, since that decision, the human rights safeguards in the Community's legal order have been further strengthened by the inclusion in the Treaty on European Union (the European Union Treaty) of articles 6 and 46 d, which refer expressly to fundamental rights, including the European Convention on Human Rights.
>
> "The respondent States underlined that the question of the requirement for a bank guarantee in the present case was examined by the Presidents of the Court of First Instance and the European Court of Justice, that neither instance accepted the applicant company's arguments and that those instances both offered a number of guarantees of a fair hearing."[128]

The European Court of Human Rights did not, however, go into the question of the responsibility of the member States for actions of the European Community, but declared the application inadmissible for other reasons.[129] Nonetheless, the issue was discussed in the submissions made during the proceedings.[130] The European Union Commission agreed with the submissions of the States members of

[128] Senator Lines GmbH v. Austria and others, C-56672/00, section A.

[129] Because the fine had in the meantime been quashed by the Court of First Instance, the applicant could no longer claim to be a "victim of a violation", as required under article 34 of the Convention.

[130] See the law set out in sections A and C of the judgement.

the European Union and rejected the idea that member States are responsible for the acts of the European Community and its institutions, pointing out that there is equivalent protection of fundamental rights in accordance with the M. & Co. doctrine developed by the European Commission of Human Rights. However, the International Commission of Jurists (ICJ), in its submissions in this case, argued that the M. & Co. test should be abandoned because member States generally remain responsible for violations of fundamental rights by organs of international organizations; under general public international law, States cannot, the ICJ argued, escape their responsibility by establishing international organizations:

> "ICJ took the view that the Court should accept the possibility of member States' responsibility for the conduct of organs of international organizations of which they are members. It considered that it would be unacceptable for violations of basic rights to go unredressed merely because the perpetrator is an international body established by the State, rather than the State itself. States should not be allowed to escape their obligations by transferring powers to international organizations. ICJ submitted that this view is in conformity with general public international law and compatible with the existing Convention case law. ICJ did not consider that the doctrine of 'equivalent protection' applied by the Commission should be continued, as it is not clear how it operates in a number of circumstances."[131]

C. *Other cases of responsibility for third-party sovereign acts on the territory of member States*

The question of responsibility for third-party sovereign acts on the territory of member States can also arise in other contexts. Two constellations under which third-party action may be related to international organizations are of particular relevance.

1. *European Community legal instruments*

The first constellation concerns the effects of legal instruments adopted by the European Community. One question that arises here is that of member State responsibility for the application and implementation of European Community law. In 1994, for example, the Federal Court of Justice (BGH) was called upon to adjudicate a case brought by a company against the Federal Republic of Germany for loss resulting from the economic embargo of Iraq.[132] This embargo had been laid down in a European Community Council regulation. BGH — like the lower instance — rejected the claims against Germany, because the embargo was contained in European Union legislation with direct effect, for which the European Community alone bore responsibility. BGH thus rejected any responsibility on the part of Germany by reason of membership or on the basis of its voting behaviour within the European Community. It also considered the ordinance enacted in Germany to implement the embargo and penalize violations thereof to be purely declaratory in effect and incapable of attributing to Germany responsibility for any impairment of basic rights potentially arising from the embargo. BGH thus assumed

[131] Ibid., section C, No. 5.

[132] Entscheidungen des Bundesgerichtshofs in Zivilsachen (BGHZ), 125, 27, also in Neue Juristische Wochenschrift (NJW) 1994, 858. The judgement of the previous instance (Bonn Regional Court) is printed in Europaische Zeitschrift für Wirtschaftsrecht (EuZW) 1992, 455.

that there is a strict division of liability between the European Community and member States — at least where European Community legislation with direct effect is involved. Interestingly enough, in a similar case the European Court of First Instance ruled that the European Community was not responsible for loss resulting from this embargo because it was imposed under a United Nations Security Council resolution and could thus not be attributed to the European Community.[133]

The other side of the coin — the extent of European Community responsibility for the implementation of its legal instruments by national authorities — was examined by the European Court of Justice in the 1986 Krohn case. A German company sued the European Community for damages because the Federal Institute for Agricultural Market Regulation had refused to grant import licences on the instructions of the Commission. The European Court of Justice held the claim to be admissible, because the challenged measure was attributable to the Commission, not the Federal Institute. It thus considered the national authority to be an "auxiliary" of the Community for the purposes of Community liability under article 288 (second paragraph) TEC for damage caused by its institutions or servants in the performance of their duties, at least when they are acting on an official instruction.[134] More recent decisions go a step further: they hold that for claims brought against the European Community for violation of official duty, it is normally sufficient for the European Community to have (co-)caused the injurious conduct of the national authority — as for example in New Europe Consulting and Brown v. Commission in 1999. In this case, the Commission had, by sending a fax to the national authorities, caused the latter to exclude the applicant from a public tender under the Phare programme.[135]

2. *Presence of foreign armed forces*

The second constellation concerns the implications of the presence of allied NATO forces on German soil. The question of liability arises when members of such armed forces cause injury or damage in the exercise of their duties. Provisions on liability are included in the NATO Status of Forces Agreement; these have already been discussed.[136] As stated above, no liability is envisaged on the part of NATO itself. Damage to third parties (private persons) is instead attributed equally to the relevant sending State and the receiving State pursuant to article VIII (5) (e). If it cannot be determined whose forces caused the injury, all member States concerned are equally liable (article VIII (5) (e) (iii)). BGH has concluded from this provision that joint and several liability exists for such non-attributable injury, so that the Federal Republic can be sued in full by private persons who have suffered such injury.[137] It has, however, already been remarked that these rules in the NATO Status of Forces Agreement are not based on responsibility by reason of NATO membership, but rather on responsibility for one's own actions. The procedural

[133] European Court reports 1998, II-667, Case T-184/95 (Dorsch Consult v. Council and Commission), in particular, para. 74.

[134] The claim was, however, dismissed because the Commission had not acted unlawfully.

[135] European Court reports 1999, II-2403, Case T-231/94 (New Europe Consulting and Brown v. Commission), in particular para. 29 ff. Cf. ECR 1994, I-4199, Case C-146/91 (KYDEP v. Commission), para. 19 ff. For a similar ruling and for a different approach, ECR 1987, 3005, Case C-89 and 91/86 (Etoile commerciale v. Commission), para. 18 ff.

[136] Supra A III.

[137] BGH NJW 1976, p. 1030; BGH NJW 1982, p. 1046; BGHZ 122, 363.

option of pursuing a claim against the receiving State also derives, irrespectively of joint and several liability, from article VIII (5) (b) of the NATO Status of Forces Agreement, according to which the receiving State pays the compensation and thereafter recoups its costs from the member States concerned. This arrangement is likewise unrelated to any idea of responsibility by reason of membership. It is rather a pragmatic way of providing legal redress to injured parties while respecting the immunity of the allied States.[138] The German case law affirming claims against the Federal Republic of Germany on the basis of the NATO Status of Forces Agreement for damage caused during exercises by allied armed forces[139] cannot thus be viewed as evidence of member State responsibility for actions of an international organization.

The jurisprudence of BGH on liability for damage caused during manoeuvres must also be seen in this light. The aforementioned provisions of article VIII (5) of the NATO Status of Forces Agreement mean that in the first instance it is the Federal Republic of Germany which is liable to third parties for damage resulting from exercises or the presence of forces on the territory, just as if its own forces were responsible for the damage. BGH has expressly affirmed a liability claim against Germany for damage caused by Belgian troops in the course of their duty for precisely this reason.[140]

The 1993 BGH decision (BGHZ 122, 363) must also be viewed in the context of the joint and several liability for non-attributable damage which, as described above, is based on the principle of responsibility for one's own actions and not on membership. In this case, BGH confirmed that a claim could be brought against the Federal Republic of Germany based on its liability for the habitual disregard of the time restrictions imposed on low-altitude flying shown by the armed forces of the NATO partners. The breach of duty and culpability were not found to lie with the German authorizing bodies, but were identified as being "on the part of those responsible within the NATO armed forces". BGH reasoned as follows:

> "Those responsible within the NATO armed forces for the conduct of the individual military low-altitude flights thus have a duty to the inhabitants of the low-flying areas to ensure that the flight times scheduled for the sake of their health are indeed respected. Of course, isolated failures to stay precisely within the allotted time slot for low-altitude flight will not of itself impair their health. However, if the NATO air forces display a serious disregard for the restrictions imposed on military low-flying exercises, restrictions imposed out of consideration for the health risks involved for the inhabitants of the low-flying areas, the respondent Federal Republic of Germany will be held liable under German law for a breach of official duty. Since, in application of the principles of German law, they must have or acquire the administrative and

[138] Germany can sue and be sued on behalf of the sending States, article 12 (2) of the Act Implementing the NATO Status of Forces Agreement.

[139] See, for example, the judgements of Oldenburg Higher Regional Court in NJW 1990, 3215; Aachen Regional Court in NJW-RR 92, 165 ff., BGH in NJW-RR 1989, 673, and in NJW 1991, 1421 ff.

[140] BGHZ 49, 267 (270).

> legal knowledge necessary for their duties (court order of 15 June 1989 — III ZR 96/88 — BGH-Rechtsprechung (BGHR) § 839 (1) first sentence of the Civil Code (BGB), judgement 13 (culpability), with further references), the members of the NATO armed forces responsible for the military low-flying exercises are culpable if when conducting low-altitude exercises they do not respect the time restrictions stipulated in the special authorization.[141]

In deciding to attribute responsibility to the Federal Republic of Germany, BGH implicitly relied on the aforementioned provisions of the NATO Status of Forces Agreement. An at best ancillary role may have also been played by the fact that the Federal Republic has not — as it has with respect to European Community regulations — relinquished its ultimate legal responsibility for permitting exercises by the NATO units stationed here.[142] This being the case, it is logical not to discharge it from liability for breaches of official duty.

The following year (1994), the Higher Administrative Court of Rhineland-Palatine ruled as follows:

> "... the Federal Republic of Germany bears legal responsibility for the effect of noise pollution from low-altitude flights — at least in areas that are particularly affected over a longer period — without any requirement that the operation of aircraft by the Federal Armed Forces be distinguished from the operation of aircraft by NATO armed forces for the purpose of identifying the potential violations."[143]

The fact that the plaintiff pursued his claims against both parties did not tarnish the admissibility of his suit based on the low-flying of Bundeswehr and NATO jet planes, because:

> "... the mere circumstance that the respondent has by reason of international law no direct powers to intervene in the affairs of its NATO partners, but is reliant on negotiation to secure compliance with the German legal order, does not make if necessary to identify the individual contributory causal elements when analysing the breach of duty. The plaintiffs applications as combined are admissible insofar as direct forbearance is demanded of the respondent as regards the Bundeswehr flights and insofar as it also has an obligation to negotiate so that the further perpetrators cease or minimize the activities complained of, so that the rights asserted by the plaintiffs are protected."[144]

When all is said and done, the case law does not suggest that the Federal Republic of Germany bears any general responsibility for the actions of NATO or other NATO members by reason of membership greater than that set out in the provisions of the NATO Status of Forces Agreement.

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[141] BGHZ 122, 363.

[142] Article 45 (1) and article 46 (1) of the Agreement to Supplement the NATO Status of Forces Agreement do give the allies the right to conduct the necessary exercises, but only subject to the approval of the competent German authorities.

[143] Higher Administrative Court of Rhineland-Palatine AS RP-SL 26, 112.

[144] Ibid.

Indeed, the more recent rulings also accept that liability exists on the basis of responsibility for one's own, even if possibly non-attributable, action, and not by reason of membership of an organization. It can therefore not be presumed that member States are liable for international organizations.

D. Responsibility of troop-contributing nations in United Nations operations

The United Nations has in certain cases assumed liability when damage or injury has resulted from United Nations operations. Any compensation awarded is ultimately paid by all Status Members of the United Nations through their financial contributions. The general principle that the United Nations is liable for damage caused by its officials in the course of their duty was confirmed by the International Court of Justice in its advisory opinion regarding Mr. Cumaraswamy.[145]

However, the attribution of liability is complicated where military operations under United Nations auspices are involved, since the participating soldiers are not direct employees of the United Nations but belong to national contingents that are made available to the United Nations by its Member States. The conditions under which contingents are made available vary greatly, as does the practice regarding assumption of responsibility for damage or injury by the United Nations. On the whole, however, a pattern can be discerned in the practice of the United Nations: it has assumed responsibility when command and control genuinely lie with the United Nations. If the operational command remained with one or more Member States, the United Nations did not recognize responsibility. The United Nations has, in general, assumed responsibility for unauthorized official action by individual members of peacekeeping forces, but not for their private acts.

As far as can be ascertained, claims have rarely been asserted directly against the troop-contributing nations.

Although not directly under the umbrella of the United Nations, the NATO Implementation Force (IFOR) and Stabilisation Force (SFOR) in the former Yugoslavia are also of relevance in connection with the practice regarding the liability of troop-contributing nations. Both forces were established as having independent international personality. The sending States have taken it upon themselves to settle any claims for damages, at the same time, however, disclaiming all legal liability.

E. Responsibility for the NATO bombing of the Federal Republic of Yugoslavia

On 29 April 1999, the Federal Republic of Yugoslavia applied to the International Court of Justice in The Hague on the basis of article 73 of the Rules of the Court, with a request for the indication of provisional measures against 10 States members of NATO, including Germany (the Legality of Use of Force case).[146] This request was rejected by the Court on 2 June 1999 because it lacked prima facie jurisdiction, in particular on the basis of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. The problem of attributing responsibility to NATO or the member States was not touched upon. The International Court of

[145] ICJ Reports 1999, p. 62 ff., advisory opinion of 29 April 1999, para. 66. This was, however, merely obiter dictum. The case was not about liability, but about the immunity of all United Nations staff.

[146] http://www.icj-cij.org/icjwww/idecisions.htm.

Justice rejected the entire application on 15 December 2004, finding that it had no jurisdiction to entertain the claims.

In its written and oral submissions, Germany focused on questions of admissibility and, in particular, on the issue of jurisdiction. The problem of whether and to what extent Germany could be held liable for the NATO air strikes was not directly addressed. In its written preliminary objections, Germany rejected the idea that the actions of international organizations could be generally attributed to their member States. In paragraph 3.45 of its preliminary objections, it stated that there could be no joint responsibility on the part of all NATO members for the alleged genocide caused by the air strikes, but rather all of the elements of the supposed crime — in particular the subjective elements — must be proven for each of the respondent States: "Each one of the respondents must be treated according to its own record."

In paragraph 3.66 of the preliminary objections, it was emphasized that the United Nations itself bears primary responsibility for all acts (and omissions) committed subsequent to the establishment of the Kosovo Force (KFOR) on the basis of Security Council resolution 1244 (1999), and that Germany was thus the wrong addressee for the claim. The Federal Republic of Yugoslavia was, in particular, reprimanded in paragraph 3.68 for not producing any indication that German personnel were involved in the disputed KFOR actions.

The European Court of Human Rights has also been seized of a case related to the air strikes. In Bankovic and others v. Belgium and others,[147] victims and relatives brought a case against the States members of NATO on the basis of an air strike on a broadcasting facility, on 23 April 1999. Germany and the other States contested the jurisdiction of the Court, since Yugoslavia was outside the area of application of the Convention (article 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms) because it had not exercised any legal authority over the territory. The Court upheld this view and dismissed the complaint as inadmissible. The question of the responsibility of the member States for acts of an international organization was not examined.[148]

The Bonn Regional Court was also called upon to adjudicate a similar claim for damages.[149] On 30 May 1999 NATO bombed a bridge in Serbia; during this air strike several civilians were wounded or lost their lives. Some of those injured and relatives of the deceased brought a claim against the Federal Republic of Germany for damages before the Regional Court in Bonn. The Regional Court dismissed the action on the basis that no actionable individual claims of this kind can be derived from international law, except under special conventional regimes, such as that provided by the European Convention for the Protection of Human Rights and Fundamental Freedoms, and because the German law of State responsibility is not applicable in cases of armed conflict. The question of whether Germany is responsible at all for NATO actions was not addressed. It would have given rise to considerable difficulties for the plaintiffs, since no German units participated directly in the attack in question.

[147] Decision of 12 December 2001, case 52207/99.

[148] Expressly stated by the Court in para. 83.

[149] Order of the First Civil Chamber of 10 December 2003 (Az.I O 361/02), printed in NJW 2004, p. 525 ff.

III. Final observations

The above analysis of conventions and case law suggests that the responsibility of international organizations is distinct from that of their member States.

The federal Government has to date advocated the principle of separate responsibility before the European Commission of Human Rights (M & Co.), the European Court of Human Rights (Senator Lines)[150] and ICJ (Legality of Use of Force) and has rejected responsibility by reason of membership for measures taken by the European Community, NATO and the United Nations.

These statements do not, however, refer to the case where German sovereign organs, in particular German armed forces, themselves committed under the auspices of one of these international organizations an act giving rise to liability. In such cases, Germany has, in the framework of SFOR and IFOR missions, settled any claims for damages without, however, recognizing any legal obligations.

The Federal Court of Justice has presumed that there is a strict division of liability between the European Community and its member States in cases involving directly applicable Community law. Its judgements on Germany's liability for damage caused by NATO forces during exercises is, on the other hand, based on the special nature of the NATO Status of Forces Agreement and does not permit generalization.

The overall trend in German State practice is to deny State responsibility for the actions of international organizations.

[150] Germany's submissions are not printed separately in the decision. Rather, the submissions of all the respondent States are summarized together. These arguments were apparently made by all the respondent States, that is, including Germany.

III. List of attachments to the comments and observations received from Governments and international organizations*

Germany

- Index of documents, agreements and court decisions on the topic of responsibility of international organizations

International Criminal Police Organization

- *Basic Legal Documents of the International Criminal Police Organization (Interpol)*
- Staff Manual of Interpol
- Annual reports of the Interpol Commission on the Control of Files, 2002 and 2003

World Intellectual Property Organization

- Contracting Parties or Signatories to Treaties Administered by the World Intellectual Property Organization (WIPO), WIPO document 423, 15 January 2005

* The attachments to the comments and observations received from Governments and international organizations are on file with the Codification Division of the Office of Legal Affairs and available for consultation.